TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 80.

CONCEPCION CALVO, APPELLANT,

vs.

ANGELES O. DE GUTIERREZ AND EDUARDO GUTIERREZ, HER HUSBAND; GABRIEL OLIVES, PAZ O. DE MARTINEZ AND MANUEL MARTINEZ, HER HUSBAND.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED AUGUST 9, 1906.

(20,328.)

(20,328.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 80.

CONCEPCION CALVO, APPELLANT,

vs.

NGELES O. DE GUTIERREZ AND EDUARDO GUTIERREZ, HER HUSBAND; GABRIEL OLIVES, PAZ O. DE MARTINEZ AND MANUEL MARTINEZ, HER HUSBAND.

PPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

INDEX.

	Original.	Print.
ption, court of first instance	1	1
ll of exceptions	1	1
Complaint	1	1
Answer	8	5
Evidence for plaintiff	14	9
Testimony of Concepcion Calvo	14	9
Plaintiff rests	16	11
Evidence for defendants	16	11
Testimony of Concepcion Calvo	16	11
Enrique Barrera y Caldez	22	14
Francisco Ortigas	31	19
Defendants rest	62	36
Evidence for plaintiff in rebuttal	63	36
Testimony of Enrique Barrera (recalled)	63	36
Testimony of Concepcion Calvo (recalled)	66	38
Plaintiff rests	68	39
Decision and judgment	70	40
Motion for new trial	75	43
Assignment of errors	75	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 23, 1907.

	Original.	Print.
Judge's certificate to bill of exceptions	75	43
Clerk's certificate to bill of exceptions	75	43
Plaintiff's Exhibit A—Contract between plaintiff and defendants, May 4, 1903	77	44
Translation of Exhibit A	79	45
Plaintiff's Exhibit B—Memorandum for draft of mortgage	81	46
Plaintiff's Exhibit C—Deed of Concepcion Calvo, July 24, 1903	82	46
Defendants' Exhibit D—Certificate of Enrique Barrera y Caldez, December 15, 1903	88	49
Defendants' Exhibit I—Mortgage obligation	89	50
Notice of motion to suspend execution of judgment	96	54
Motion to suspend execution of judgment	97	54
Decision on motion to suspend judgment	98	55
Notice of decision on motion to suspend judgment	100	56
Request to set cause	101	56
Submission	102	57
Order setting cause	103	57
Order beginning hearing	104	58
Order concluding hearing and submitting cause	105	58
Decision	106	59
Notice of decision	116	64
Petition for explanation of decision	117	65
Notice of decision on petition	119	66
Judgment	120	67
Petition for appeal	122	67
Assignment of errors	124	68
Order allowing appeal	126	69
Bond on appeal	127	70
Citation and service	130	71
Clerk's certificate to papers	131	72
Letter of clerk to court of first instance	132	72
Clerk's certificate as to sending papers to court below	133	72
Clerk's receipt for papers	134	73
Stipulation as to correctness of record	135	73
Clerk's certificate to transcript of record	136	73

1 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance of the City of Manila.

CONCEPCIÓN CALVO, Plaintiff,

vs.

ANGELES O. DE GUTIERREZ and Her Husband, EDUARDO GUTIERREZ; GABRIEL OLIVES, PAZ O. DE MARTINEZ and Her Husband, MANUEL MARTINEZ, Defendants.

Bill of Exceptions.

Be it remembered that in the above entitled cause the following proceedings were had in the Court of First Instance of the City of Manila, that is to say,

On the 16th day of December, 1903, the plaintiff presented to the Court her complaint against the defendants in words and figures as follows:

Concepcion Calvo, the plaintiff in this, the above entitled action, states:

I.

That she is the surviving spouse of Francisco Gonzalez de la Fuente y Esquivel.

II.

That Gabriel Olives y Ganzalez de la Fuente is a nephew of the deceased husband of this plaintiff.

2 III.

That Angeles Olives y Gonzales de la Fuente is a niece of the deceased husband of this plaintiff, and Eduardo Gutierrez y Repide Gonzales.*
is the husband of said Angeles Olives y Gutierrez.

IV.

That Paz Olives y Gonzalez de la Fuente is a niece of the deceased husband of this plaintiff, and Manuel Martinez is the husband of said Paz Olives y Gonzalez.

V.

That the deceased husband of this plaintiff died on the 6th day of July, 1902, and left a will which was duly probated as required by law.

VI.

That by said will the defendants, Gabriel, Angeles and Paz, *sir*named Olives y Gonzalez de la Fuente, were named the heirs in

*In pencil in copy.

equal shares in the ownership of all the property, goods and rights of the deceased husband of this plaintiff.

VII.

That by said will all the property, goods and rights of the deceased husband was bequeathed in usufruct to this plaintiff.

VIII.

That on the 4th day of May, A. D. 1903, this plaintiff and said defendants entered into an agreement for a division of said estate, which agreement was in writing, a copy of which is hereto attached, marked "A," and made a part hereof.

IX.

That pursuant to said agreement the real estate on the Escolta known as No. — Escolta, was sold for $90,000, Mexican Currency, and out of the said proceeds of said sale were paid the charges
3 mentioned in paragraph 2 of said agreement, as follows:

1903.*			
Aug. 17th.	Paid to Obras Pias for their credit and interest due and unpaid.....		$5968.55
Sept. 1st.	Delivered to Francisco Ortigas for Roensch		3934.98
" 10th.	Delivered to Carmen Barredo as her legacy		500.00
" " "	to Socorro Barredo balance of her legacy		540.00
" " "	to Angela Barredo balance of her legacy		398.00
" " "	to Enrique Barrera, guardian of the minor, Lorenzo Calvo, as balance of the legacy of Maria Fabie, the minor's mother....		400.00
			$11741.53

X.

That under and in pursuance of said agreement hereinabove in Par. VIII referred to, plaintiff is entitled to the use and enjoyment of the remaining balance of the proceeds of said sale, amounting to $78,258.47, Local Currency, to have and enjoy the usufruct thereof during the lifetime of plaintiff.

XI.

That out of the said sum of $78,258.47, Local Currency, the said remaining balance of the proceeds of said sale, the defendants above named have wrongfully and unlawfully converted and appropriated to their own use the sum of $46,447.50, Local Currency, and the usufruct thereof. That the further sum of $31,810.97, Local Currency, has been at all times since the consummation of said sale, and now is in the possession of the notary public before whom the

* In pencil in copy.

said sale was consummated and executed, Don Enrique Barrera y Caldes. That said notary public renounces [and disclaims]* any right, title or interest in or to said moneys and the whole thereof, and holds the same subject to the order of this Court.

XII.

That the right, title and interest of the deceased in and
4 to the property known and designated as No-. 22 and 23 Calzada de San Luis, Ermita, was subject to an equity of redemption in favor of Pantaleona Rivera, whereby the said property was subject to be redeemed by said Pantaleona Rivera upon payment of the sum of $10000, Local Currency, together with interest thereon to the time of payment.

XIII.

That subsequent to the execution of the agreement hereinabove referred to and set forth, the said property last hereinabove referred to has been redeemed by said Pantaleona Rivera for the sum of $15000, Local Currency, being the redemption price of $10000, Local Currency, together with the interest accrued thereon, since the sale, expenses and other disbursements made for the preservation and betterment of the property. That out of the amount received by the defendants as proceeds of the said redemption, the said defendants paid to Julian Lao the sum of $12,000, Mexican Currency, being the amount of the debt referred to in paragraph II of the agreement of May 4, 1903, leaving a liquidated balance of $3000, Mexican Currency.

XIV.

That under and by virtue of the terms of the agreement hereinabove referred to and set forth the plaintiff is entitled to the use and enjoyment of one-half of said sum of $3000, Local Currency, or $1500, Local Currency, to have and to enjoy the usufruct of said sum of $1500, Local Currency, during the lifetime of plaintiff.

XV.

That the said sum of $3000, Local Currency, and the whole thereof, has been received by the defendants and has been at all times since the consummation of the redemption hereinabove referred to, and now is, in the possession of said defendants.
5 That of the said sum of $3000, Local Currency, the defendants have unlawfully and wrongfully converted and appropriated to their own use and benefit the sum of $1500, Local Currency, and the usufruct thereof, being the amount which the plaintiff is entitled to have and enjoy in usufruct as aforesaid.

XVI.

That under and by virtue of the terms of the agreement hereinabove referred to and set forth, plaintiff is entitled to the use and

[*Words enclosed in brackets erased by pencil.]

enjoyment of an undivided one-half interest in and to that certain property known and designated as No. 97 Calle Palacio, in the City of Manila, P. I., and in the Hacienda de Pasacao to have and enjoy the usufruct of said undivided one-half interest in and to said property during the lifetime of plaintiff. That at all times since the execution of said agreement hereinabove referred to and set forth the defendants herein have been and now are in the exclusive possession and enjoyment of said property last hereinabove mentioned and the whole thereof wrongfully [and unlawfully[* converting and appr*p*priating to their own use and benefit the undivided one-half interest in and to said property and the usufruct thereof to their own use and benefit.

XVII.

That plaintiff has not sufficient property other than that herein referred to, to enable her to make and execute in favor of defendants, a mortgage sufficient to secure to defendants the preservation of the property of which the plaintiff is entitled to the use and enjoyment in usufruct during the lifetime of plaintiff. That availing themselves of the said inability of plaintiff, the defendants have failed and refused and still fail and refuse to accord to plaintiff the
6 said use and enjoyment of said property and the whole thereof.

XVIII.

That plaintiff is informed and verily believes that the defendants have disposed or are about to dispose of their rights, title and interest in and to the property hereinabove referred to and that said defendants are, and each of them is, not able to respond financially to the claims of this plaintiff, nor to satisfy and liquidate any judgment which may hereafter be rendered in the present action. That by reason of the foregoing facts, the rights of this plaintiff as hereinabove set forth, are in great danger of being wholly lost to plaintiff.

Wherefore, plaintiff respectfully prays:

I.

That an order of this Court issue forthwith naming and appointing a receiver with instructions to take and to reduce to his possession all of the property hereinabove referred to, or so much thereof as may be discovered by said receiver, to administer the same to the best interests of the parties to this action under the direction and supervision of this Honorable Court, and to hold the same pending the further order of this Court, or the final determination of this action.

II.

That upon the final determination of this action a permanent depositary be named and appointed by this Honorable Court to re-

[*Words enclosed in brackets erased by pencil.]

ceive the property hereinabove referred to and described in trust to administer the same for the use and benefit of plaintiff during the lifetime of said plaintiff and to deliver *to* reversion thereof to defendants upon the death of said plaintiff.

III.

That said defendants be ordered and required to surrender
7 and deliver unto said depositary the sum of $47,947.50, Local Currency, and an undivided one-half interest in and to the property known and designated as No. 97 Calle Palacio, of the City of Manila, P. I., and in the Hacienda de Pasacao, or so much thereof as may not have been previously delivered and surrendered unto the receiver theretofore named and appointed in this action.

IV.

That said depositary be ordered to pay and deliver unto the plaintiff, Doña Concepcion Calvo, the one-half part of the rents and profits had and received of and from the property known and designated as No. 97 Calle Palacio, of the City of Manila, P. I., and to pay and to deliver annually unto said plaintiff out of the funds in the possession of said depositary the annual sum of $6,381.47, Local Currency, being the proceeds of the use and enjoyment of the sum of $79,768.47, Local Currency, at the rate of 8 per cent. per annum.

V.

That plaintiff have judgment for her costs of suit.

VI.

That plaintiff have such other and further relief as may be meet in law or in equity.

Manila, P. I., December 16th, 1903.

(Signed) COUDERT BROTHERS,
CHARLES C. COHN,
Attorneys for Plaintiff.

(The agreement of May 4, 1903, mentioned in above complaint is quoted verbatim in the decision of the Court of First Instance, *infra.*)

8 On the 31st day of December, 1903, the defendants presented and filed their answer to said complaint in words and figures as follows:

Now come the defendants in the above entitled cause, and jointly and separately in answer to said complaint state:

1st. That they admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of said complaint.

2nd. That the property mentioned in paragraph I of the agreement which is attached and marked Exhibit "A" situated in the Escolta, belonged before his death, one half of it to the husband of the plain-

tiff, Dn. Francisco Gonzoles de la Fuente y Esquivel and the other half absolutely to these defendants; that according to the terms of his last will and wish the one half belonging to said Dn. Francisco Gonzales deceased was left by him to this defendants as their inheritance, allowing his widow the usufruct of said one half during her lifetime.

3rd. That of the property referred to in paragraphs 12, 13, 14, 15 and 16, of the complaint one half of the same was owned by said Francisco Gonzalez at the time of his death and the other half of said property was owned by these defendants, and that by virtue of the last will and wish of said Francisco Gonzalez he left his half to these defendants as an inheritance granting his wife the usufruct of said sum during her lifetime.

4th. That according to the agreement of May 4th, 1903, between the plaintiff and these defendants, copy of which is attached to the complaint, the house situated in the Escolta was to be sold for no less than $90,000.00; that on or about the 10th of August, 1903, and by virtue of the above stated agreement, said house was sold for $90,000.00, and that one half of said sum, viz, $45,000.00, from the sale of said house, which never did belong to the aforementioned Dn. Francisco Gonzalez, because during his lifetime one half was owned absolutely by these defendants, was justly due, paid and delivered to these defendants. Now of the other half from the proceeds of the sale, viz: $45,000.00, which, according to the last will aforementioned, the widow was to enjoy its usufruct during her lifetime, all the debts and obligations pending against the estate—some of which, but not all—are included in paragraph 8 of the complaint, had to be paid.

9

5th. That before proceeding with the sale of the house on the Escolta, there were re-sold to Da. Pantaleona Rivera the two houses in Ermita which are referred to in paragraphs 12, 13, 14, and 15 of the complaint, for the sum of $15,000.00; that from this sum received from the aforesaid sale one half, viz: $7,500.00, was absolutely owned by these defendants, and the other one half was also owned by them, subject to the usufruct of the plaintiff during her lifetime; that notwithstanding the right of the defendants to receive absolutely, and without restriction, the said sum of $7,500.00 immediately after the sale was consummated, they have only received the sum of $3,000.00, having invested the remaining $4,500.00 due them, together with the other $7,500.00, whose usufruct is owned solely by the plaintiff in the payment of a debt to Dn. Julian de la O amounting to the sum of $12,000.00 which the said deceased husband of the plaintiff owed said person.

6th. That from the proceeds of the sale of the house on the Escolta, sold on the 21st day of August, 1903, $45,892.50 were paid to these defendants, the surplus of $892.50 being for sums advanced by said defendants for the purpose of paying Mr. Julian de la O. The balance of the proceeds, viz: $44,107.50, was left in the possession of Mr. Barrera, to whom reference is made in paragraph XI of the complaint, who then bound himself to pay all outstanding obligations against said estate.

10 7th. That from said sum, in possession of said Barrera, there was due, and is still due by said Barrera to these defendants the sum of $3,608.00 advanced to Julian de la O by the defendants out of their share in the sale of the property in Ermita, which said Barrera refused, and still refuses, to refund to these defendants, and also to account for any of the payments made by him.

8th. That at the time of leaving said money in the possession of Mr. Barrera the above plaintiff had agreed with these defendants to execute and deliver forthwith to them a mortgage in their favor to cover the sum left in the hands of said Barrera, excepting the sums for the debts already paid, and also for the value of one half interest in the property which is referred to by the plaintiff; and that in compliance with said agreement the plaintiff, through her agent and adviser, the aforementioned Barrera, presented for signature in November last to these defendants a certain proposal of a mortgage in their favor covering the sum of $31,810.97, which, it was alleged, was the price of the sale of the property on the Escolta remaining in the custody of said Barrera after the payment of certain debts; that the aforementioned proposal of mortgage pledge was so inequitable in its terms and so distant from the provisions of the agreement of May 4th, 1903, as also with the provisions of the Civil Code governing these matters in these Islands that these defendants refused to sign or receive said mortgage, and that after that, and for the first time, the aforementioned plaintiff and her agent and adviser, the said Barrera, absolutely refused to furnish any guarantee for said money, and does now refuse to deliver said money to the defendants or to deposit the same in Court, as these defendants have repeatedly demanded.

11 9th. That the plaintiff is today, and has for considerable time been, in possession of the Hacienda of Pasacao, not only of the one half which she is entitled to have in usufruct, after having complied with the formalities of the law, but also the other one half which is owned absolutely by these defendants, and which the plaintiff has converted to her own use and benefit to the great damage and loss of these defendants; and that the plaintiff has retained and taken possession of one half of the property situated on Calle Palacio bequeathed to these defendants by the deceased husband of the plaintiff in this case, even without having given these defendants the proper guarantee, and that her possession of said property is illegal and contrary to law; that none of these defendants or any of them have ever had possession of any property belonging to the plaintiff, and that all the allegations contained in said complaint in regard to this matter are false and devoid of all truth, and the plaintiff well knew of this fact at the time of the filing of this action, and that the petition for the appointment of a receiver in this case was, as defendants believe, and therefore allege, made with the intention to deceive and surprise the Court.

10th. And these defendants deny that the plaintiff has any right to the use or enjoyment of any part of the moneys received by said defendants from the sale of the said property on the Escolta or from the property in Ermita, and deny that they or any of them have

converted or appropriated for their own use anything whatsoever which is not absolutely their own.

11th. That the plaintiff is entitled to the usufruct during her lifetime of the balance of one half of the price of the sale of the property on the Escolta, excepting the debts that out of said half part have been paid, or may have to be paid; to the usufruct of one half
12 of the property known as Calle Palacio No. 97, and to the usufruct of one half in the Hacienda de Pasacao, as soon as she has fulfilled—and no sooner—the provisions of the Civil Code and the agreement which is referred to as Exhibit "A" in the complaint, by making in favor of defendants a mortgage sufficient to cover the money left in the custody of said Barrera, plus the value of a half interest in the aforementioned property; and that the defendants be required not only not to return the sum of $41,447.50, nor any part thereof, but on the contrary that they are entitled to be reimbursed out of the one half of the price of the sale now in the hands of said Barrera, the advance of $3,603.00 which they advanced for the payment of the obligation due to Mr. Julian de la O, and that they have the absolute and unconditional right to the immediate possession of the properties of Pasacao and that on Calle Palacio.

12th. That the plaintiff has no right to the use or enjoyment of any part of the sale price of the property sold on the Escolta corresponding to the half interest of the defendants in the same; that the agreement of May 4th, 1903, between the plaintiff and the defendants did not anticipate nor interpret such use or usufruct, but that the plaintiff and those defendants long prior to said contract, and by said agreement, and subsequent to said agreement, have recognized repeatedly that the rights and interests of the parties interested are the ones which appear and are alleged in this answer; that all the allegations and pretentions of the plaintiff in the present case are not made in good faith, nor has she ever thought of them, nor have they been advanced, alleged or presented by the plaintiff, nor by anybody on her behalf, till after the agreement of May 4th, 1903, and long after the sale of the property on the Escolta, and not until these defendants at the end of November, 1903, refused to
13 accept a mortgage inadequate and insufficient as a guarantee of the obligations of the plaintiff; that even at the time of tendering said mortgage the plaintiff recognized and admitted, not only the right of these defendants to retain absolutely and forever, as their property, not only all the money which has been received and of which they are accused in the complaint of having converted to their own use, but also admitted her strict obligation to give to these defendants a guarantee by means of a mortgage in the value of the sum in the custody of said Barrera, plus the value of a half interest in the rest of the property referred to in the complaint.

13th. Whether or not the sum of $31,810.97 has been continuously in the possession of Mr. Barrera since the same reached his possession, or whether said sum, or any part thereof, is not there the defendants have no way of knowing, and therefore can neither admit nor deny, but they ask that strict proof of these allegations be

presented, and for that purpose ask that Mr. Barrera be summoned to appear before this Court and produce his accounts showing the disposition he has made of said funds.

14th. That the plaintiff is the absolute owner of two certain houses with their improvements, and that with these and other property which can be bought with money pertaining to the usufruct under the legal restrictions, she can execute a mortgage in favor of these defendants ample and sufficient as a guarantee in the value of the property in usufruct bequeathed by her deceased husband to these defendants for their protection, and with no prejudice to herself.

15th. The defendants deny each and all allegations contained in said complaint excepting what has already been admitted.

Wherefore these defendants pray that the appointment of the receiver be set aside and revoked; that Mr. Barrera be required
13½ to deposit immediately in this Court all the moneys received from the sale of said property on the Escolta, and that said funds be delivered to these defendants, and that the plaintiff be ordered to turn over the possession of the properties of the Hacienda de Pasacao, and that on Calle Palacio, for its possession, administration and enjoyment, and that the account between the plaintiff and these defendants be liquidated according to the terms of the will of her deceased husband; and that defendants recover judgment against plaintiff in the sum of said liquidation as may be shown to be due and owing, and for the costs and damages in this case; and for any other remedies which may be deemed just and which the Court may find proper to concede.

C. H. MARPLE,
Attorney for Defendants.

14 THE UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance, City of Manila, Part III.

Case No. 2333.

CONCEPCION CALVO
versus
ANGELES O. DE GUTIERREZ and EDUARDO GUTIERREZ, Her Husband; GABRIEL OLIVES, PAZ O. DE MARTINEZ, and MANUEL MARTINEZ, Her Husband.

Before Honorable John C. Sweeney, Judge, November 8th, 1904.

Appearances.

Coudert Brothers, for the plaintiff.
Hon. William J. Rhode, for defendants.

CONCEPCION CALVO, the plaintiff, being duly sworn, testified in her own behalf as follows:—

Direct examination by Mr. COHN:

Q. What is your name and residence?
A. Concepcion Calvo, 114 Calle Solano, Walled City.

Q. You are the plaintiff in this action?
A. Yes, sir.

Mr. COHN: I call your Honor's attention to the fact that the answer in this case specially admits paragraph 1 to 9 inclusive of the complaint.

Q. What property other than that referred to in this action are you the owner of?
15 A. I have two houses and a participation in a third house.
Q. What is the total value of these houses and the participation in the other?
A. I do not know exactly because I have never endeavored to sell them.
Q. In what sum are they assessed by the tax collector of this city?
A. I cannot tell you exactly but I have the papers at home.
Q. Approximately?
A. I cannot say exactly but approximately the taxes are $200 each.
—. Can't you state approximately the value of the properties of which you are the owner in addition to these?
A. For the one on Calle Solano I have been offered 20,000 pesos.
Q. And for the other?
A. Mr. Gutierrez knows very well that in the lifetime of my husband they were offering 40,000 pesos and I did not want to give it.
Q. Where is that house?
A. The one situated on Plaza Palacio.
Q. Is that the house referred to in this case as Calle Palacio?
A. No, sir, this one here in the complaint is "Calle Palacio" and the one I refer to is on Plaza Palacio.
Q. What is the value of the participation which you have in the third house?
A. I cannot say anything about that.
Q. About how much?
A. The rental of that house is over 200 pesos to be divided in four parts and I have one of those parts.
16 Q. Are these properties mortgaged by you?
A. Yes, sir, the one on Plaza Palacio is mortgaged.
Q. How much is it mortgaged for?
A. It was mortgaged for 5,000 when I was married but now it is only about 2,000.

The COURT: Are these defendants all of age?
Judge RHODE: The ladies are married and the young man is of age.
Mr. COHN: That is all.

Cross-examination by Mr. RHODE:

Q. Were you present when the celebration of the sale of the house on the Escolta was made?

Mr. COHN: Objected to as not proper cross-examination.

Judge RHODE: I confess it is not. That is all.

Mr. COHN: The plaintiff rests upon the admissions expressed and implied in the pleadings.

For the defense:

The plaintiff, DOÑA CONCEPCION recalled for the defense.

Direct examination by Judge RHODE:

Q. Were you present the day when the contract of sale was celebrated for the house on the Escolta?

A. Yes, sir.

By Mr. GUTIERREZ:

Q. You have testified that you were present at the time of the execution of the deed of sale, is that true?

A. Yes, sir.

17 Q. You were aware, therefore, of all that occurred there at that time with reference to the partition of the money which was paid?

A. When the money was divided I had previously left.

Q. But you were informed, Mr. Ortigas was then your legal representative and adviser?

A. He had no special power of attorney but he was the mediator for me with them.

Q. Who was your attorney?

A. He was the arbitrator between us.

Q. But whom did he represent?

A. As I could not treat directly with the heirs it was he who represented me in conference with them.

Q. Did he report to you everything that he did?

A. Not always; according to the circumstances.

Q. Did he report to you what took place in the office of Senor Barrera on the afternoon of the sale of the Escolta property?

A. No, sir.

Q. Did he ever give you an account?

A. Yes, he notified me afterwards, telling me to go and look at the document.

Q. What else did he say?

A. Nothing more I went to see it afterwards.

Q. To what writing do you refer?

A. He told me to go there to Mr. Barrera's office to look at the writing.

Q. Did you see the writing to which you refer?

A. The writing referred to the money which I was to re-

18 ceive in accordance with the terms of the contract and as the sum stipulated was not that which the contract stipulated I refused to sign it.

Q. Did you have with Señor Ortigas any conversations concerning whether or not we would accept as a guarantee for the 31,000 pesos the properties which you have on Calle Solano and Plaza Palacio?

Mr. COHN: Objected to as incompetent, irrelevant and immaterial being adduced for the purpose of varying the terms of a written agreement by parole evidence.

The COURT: What do you want to prove by this witness?

Judge RHODE: We expect to prove by this witness that she, in conversations with her attorney, subsequent to the making of the contract herein question, held conversations with her attorney which clearly indicate that she never expected to receive in usufruct more than half the money, the purchase price of the house on the Escolta after the payment of the debts had been deducted from that half coming to her in usufruct.

The COURT: Objection sustained. The document is the best evidence of the understanding of the parties.

Judge RHODE: Exception.

Mr. GUTIERREZ:

Q. Were you informed of the sum which remained in the possession of Señor Barrera?

A. When?

Q. After the execution of the deed of sale for the house on the Escolta?

A. No, sir.

Q. So that after executing it you did not concern yourself with the particulars, the price, etc.?

19 A. No.

Q. In whom did you confide to attend to these matters?

A. Because they had to, in the course of time, account to me for the proceeds of the sale.

Q. Who had to account to you after you had executed the deed of sale?

A. Señor Ortigas who brought to me the deed to be signed.

Q. So that you confided altogether in Mr. Ortigas?

A. No, sir, I could not.

Q. He is the only person who intervened, inasmuch as you did not concern yourself at all?

A. He was the only person who intervened between them and myself.

Q. Didn't you go to Señor Barrera's office to find out how much money had been entrusted in his hands after you had executed the deed of sale?

A. After some months I met Señor Ortigas on the street and he said to me that Señor Barrera had a document that I should go and inform myself of the same. I went immediately and he handed it to me.

Q. What did this document state?

A. What it said was that they had not complied in any respect with the terms of the contract which we had signed.

Q. Without stating whether it complied or not with the terms of the contract, state what was the nature of the document what did it refer to?

A. To the sale of the house on the Escolta, it referred to the sale

of that property and the money which I was to receive in usufruct which was not in accordance with the terms of the contract which we had executed. We had previously signed the deed of sale
20 which was not read to me and I paid no attention after the execution of the contract which had no value after the signing.

Q. How many documents did you sign?

A. One before the contract.

Q. Do you know what that escritura referred to?

A. That is the one that I tell you I did not read, it referred I think to the sale of the property on the Escolta.

Q. Who was the notary who executed this escritura?

A. I do not know, Señor Ortigas brought it to my house to sign it.

Q. Didn't you see another escritura after that?

A. No escritura.

Q. Don't you remember having signed a deed of sale to the building on the Escolta in the office of Señor Barrera?

A. Of the sale of the house on the Escolta, yes, sir.

Q. So that you now remember two escrituras?

A. One before the contract.

Q. After this escritura which you signed in the office of Mr. Barrera did you return to the office of Señor Barrera to read the draft of the instrument that Mr. Ortigas spoke to you about?

A. After considerable time, after much time.

Q. After what time?

A. It was a long time afterwards; it was not in the present month; that is to say, November, it was in the month of October.

Q. State whether or not shortly after the execution of this
21 document you did not have a meeting with Señor Barrera in order to turn over to him the document which had been left in your house?

A. No, sir.

Q. Do you remember whether in this document which you say you read in the office of Mr. Barrera at the request of Mr. Ortigas there was treated the question of the mortgage to us of your house in Plaza Palacio and Calle Solano?

A. I did not fix my mind on anything except upon the sum of money which it stated I was to receive.

Q. How much did it state in that document you were to receive?

A. Thirty-odd thousand pesos.

Q. Do you recognize the signature which appears on this large instrument as yours (Exhibit "A").

A. Yes, sir.

Mr. GUTIERREZ: That is all.

Cross-examination by Mr. COHN:

Q. At the time of the execution in the office of Senor Barrera the deed of sale of the Escolta property who was present besides yourself?

A. The heirs and Mr. Ortigas.

Q. Was the notary, Senor Barrera present?
A. Yes, sir.
22 Q. Were you all together in the same office?
A. No, sir; that is we were in the office, but I was in another room.
Q. Who was present in the room in which you were when you signed the instrument?
A. Señor Barrera and Mr. Ortigas.
Q. How long did you remain after signing your name to the deed?
A. No time.
Q. You left immediately?
A. Yes, sir.
Q. What was the reason, if any, for your remaining separate from the other signing parties?
A. Because I had some trouble and unpleasantness with the heirs.

Mr. COHN: That is all.

ENRIQUE BARRERA Y CALDEZ, a witness for the defense, being duly sworn, testified as follows:

Direct examination by Judge RHODE:

Q. What is your name and residence?
A. Enrique Barrera y Caldez, Calle Real, Walled City, #202.
Q. What is your profession?
A. Notary public.
Q. Do you know the defendant, Concepcion Calvo?
A. Yes, sir.
Q. Do you know Angeles de Gutierrez, Paz Martinez and Gabriel Olives?
23 A. Yes, sir.
Q. Did you intervene in any matter in which these persons were interested?
A. Yes, sir.
Q. Will you state in what you intervened and in what manner?
A. Yes, sir, they asked me my opinion concerning the legality and validity of certain title papers to an urban property located on the Escolta. Subsequently they entrusted to me the execution of a deed of sale of this property and the sale was realized after which they delivered to me a certain sum proceeding from said sale, with the obligation to make certain payments and deduct the amounts from the amount delivered to me.
Q. Who were the persons who participated in the execution of this sale and in what capacity?
A. Don Gabriel Olives, Doña Angeles Olives, Doña Paz Olives, the last two with the coöperation of their respective husbands and as heirs and owners of the bare titled of the usufructuary in half of the property and as owners of the bare (*nudo propriedad*) title of the other half and Doña Concepcion Calvo as the usufructuary of the half of said property.

Q. Can you state whether Doña Concepcion Calvo was present when this document was signed?

A. Then the instrument was signed by Doña Angeles Olives and Doña Paz Olives and Don Gabriel Olives and the husbands of the former two.

C. A. McD.

Q. Was Doña Concepcion Calvo *was* present when the documents

C. A. McD.

was executed; & was the attorney Francisco Ortigas present when this instrument was signed by the above named persons?

24 A. Dona Concepcion Calvo came to my office, sending in a note to Senor Ortigas and Senor Ortigas spoke to Dona Concepcion Calvo in the next room stating immediately afterwards that Dona Concepcion Calvo was in a great hurry to leave and desired to sign the instrument in the nature of and with the consent of the other interested parties. Senor Ortigas and I obtained the signature of Dona Concepcion Calvo to the instrument of sale.

Q. Was the price of the sale actually paid at that time?

A. When the document was once executed by the vendors and by the purchaser, who was also present, the latter made delivery of the price of the sale.

Q. Was Senor Ortigas present?

A. Yes, sir.

Q. Whom did Senor Ortigas represent at that time?

A. I suppose that he represented Dona Concepcion Calvo.

Q. Was he at that time the attorney for Dona Concepcion Calvo?

A. If he was not her attorney, he was at least her advisor.

Q. What disposition was made of the proceeds of the sale of this property, in what form was it distributed?

A. That is a point upon which I cannot testify, I can only state that the interested parties, or in other words, the heirs, and Senor Ortigas made up a certain account which I do not know. They distributed the amount in a manner of which I have no knowledge, the only thing which I can state is, that which I remember, because it was the cause of a slight discussion between the heirs and Senor Ortigas and that was the delivery of the sum of 500

25 pesos to a person of the Chinese race; concerning the conditions of the division I have no recollection. When the distribution was made in the form in which these gentlemen agreed upon, there was delivered to me the sum of 43,552.50 pesos, in order that I should preserve the same in my possession and with the sum, satisfy certain obligations and the balance deliver to Dona Concepcion Calvo when she should execute the contract with the heirs.

Q. What was the contract that you refer to?

A. I suppose that it was a contract referring to the usufrustuary and guarantee covering the responsibility of Senora Calvo of the moneys held by her in usufruct, which she was to execute as a guarantee.

Q. Were you asked by Dona Concepcion Calvo concerning the amount of money which was left with you for delivery to her?

Mr. COHN: Objected to as incompetent and varying the terms of a written instrument.

Judge RHODE: We claim that the acts executed by any party to a contract must be taken into consideration in construing the contract.

The COURT: I will reserve my ruling on that question until the disposition of the case.

A. Yes, sir.

Q. When was this?

A. When Senora Concepcion Calvo presented herself in my notary office stating to me, or rather asking me whether I had prepared the instrument of mortgage in favor of the heirs to guarantee the sum which she was to receive in usufruct and to be informed
26 of the sum which I was guarding in my possession after the deductions of the payments made, she stating to me that she was not in conformity with the contents of a contract which she had previously executed with the heirs and she refused to sign this instrument of mortgage.

Q. Did she ask you previous to this occasion concerning the amount which you had deposited in your hands and remaining after the payment of legacies to the legatees?

A. No, sir, I never saw Dona Concepcion Calvo only twice,—the day she executed the deed of sale and the day she came to my office to ask if there was ready the instrument of mortgage.

Q. Had this draft of an instrument of mortgage been already rejected by the heirs when Dona Concepcion Calvo presented herself at your office?

A. I do not know, I can only state that after some days had passed after the signing of the deed of sale Senor Ortiga entrusted to me the drafting of the instrument of mortgage from certain data he gave me in writing. When the draft of the instrument of mortgage was prepared it was sent to Senor Ortigas and after eight days Senor Ortigas returned to me the draft of the instrument with other notes modifying the contract, stating to me that they were exactions which had been made by the other interested parties.

Q. This was previous to the visit of Dona Concepcion Calvo to your office?

A. Yes, sir.

Q. Do you know that the balance of the sum after deducting the amount which was delivered to you was delivered to the defendants in this action?

27 A. Yes, sir, because each one of them carried away a check but I am ignorant of the sum.

Q. Was Senor Ortigas present when each one of them took away a check?

A. Yes, sir.

Q. Is it not true that this draft of the instrument of mortgage was drawn up some months after the execution of the deed of sale?

A. I remember perfectly the month in which I drafted the instrument of mortgage, I do not remember the deed of sale but

in the month of October I drafted the proposed instrument of mortgage.

Q. What year?

A. 1903 (consulting document).

Q. Did you make any payments from the moneys which were left in your hands?

A. Complying with the instructions I received, yes, sir.

Q. From whom did you receive those instructions?

A. From those who were present in the act.

Q. Were these payments made at that time?

A. What payments?

Q. These payments?

A. No, sir, the sum of money was left in my hands to make the payments, they were not paid at that time.

Q. Who gave you the data for these payments?

A. The interested parties.

Q. Was Senor Ortigas present?

A. Yes, sir.

28 Q. Mr. Ortigas gave you instructions concerning this?

A. Yes, sir, Senor Ortigas and the other interested parties in addition to those from Mr. Ortigas I received other instructions from the other interested parties.

Q. All the payments which you subsequently made were authorized by the interested parties?

A. Yes, sir, if not, I would not have made them.

Q. Have you vouchers for these payments you made?

Mr. COHN: Objected to this line of questions on the ground that the payments are all admitted in the answer; they are enumerated in the complaint.

Q. Who furnished you with the data from which to ascertain the amounts that had already been paid upon the legacies and pending payment?

A. Senor Ortigas, who had in his possession the vouchers for the payments already made.

Q. Did you recognize in him the authorized representative of Dona Concepcion Calvo?

Mr. COHN: Objected to as incompetent, irrelevant and immaterial.

Judge RHODE: It appears that the lady was not personally present, now in order to make the chain complete, we will have to show that there was a person who acted there in her stead and afterwards we must show this person was authorized to so act.

Mr. COHN: If that offer is complied with, that he was authorized to act, that will make it competent and I will have no objection.

The COURT: I will reserve my ruling.

29 A. No, sir, my understanding was, that he was her attorney or legal adviser, and I base myself in making that statement upon the fact, that if he had been the legal representative of Dona Concepcion Calvo, Senor Ortigas would have been the one to sign the instrument of sale.

Q. You understood, didn't you, that it was necessary to have the *the* authorization of Dona Concepcion Calvo to do the things that you were to do afterwards, because she was one of the interested parties?

A. Yes, sir.

Q. Did you consider that you had the authority of Dona Concepcion Calvo to do what you did do subsequently?

A. Yes, sir.

Q. In what manner did you consider you had her authority to do what you did subsequently?

A. Extra-officially; this trust was not conferred upon Notary Barrera but upon me personally as Barrera and in proof of that I will cite the fact that I was not required to furnish any receipt, in spite of the extraordinary large sum entrusted to me, for which I am deeply grateful.

Q. Then you, as the private individual, Enrique Barrera y Caldez executed an act which you did not have the authority of Dona Concepcion Calvo to execute?

A. Because I considered that I had the conformity of these people.

Q. And of Dona Concepcion Calvo as well?

A. As a consequence, yes, sir, and I confided in Mr. Ortigas

30 Q. As the representative of Dona Concepcion Calvo?

A. Yes, sir.

Q. Do you recognize this writing as signed by you (presenting paper to witness)?

A. Yes, sir.

Q. Have you in your possession the draft of the instrument of mortgage to which you have referred?

A. Yes, sir, here it is (presenting paper to attorney)

Q. Did you receive from Dona Concepcion Calvo the data from which to draft this instrument in the form in which it is?

A. I have already stated that I received them from Mr. Ortigas.

JUDGE RHODE: That is all.

Cross-examination by Mr. COHN:

Q. After the visit of Dona Concepcion Calvo to your office and her refusal to execute this mortgage, did you see the contract to which she referred to upon which she based her refusal?

A. Yes, sir, subsequently to the conference which I had with Dona Concepcion.

Q. Did you see this before?

A. No, sir.

Q. At whose request was it shown to you?

A. At my request when I saw that the lady refused to sign the contract basing herself on the previous contract.

Q. What occurred when she refused to sign and stated that there was another contract?

A. I did not do anything.

31 Q. You say the contract was brought to you at your request; did you then request the presentation of this contract?

A. Yes, sir, on the evening of the day on which this lady refused to sign the contract.

Q. At the time of the execution of the deed of sale and at the time of the preparation and drafting of this mortgage were you representing the interests of Dona Concepcion Calvo?

A. Myself, no, sir.

Mr. COHN: That is all.

Redirect examination by Mr. GUTIERREZ:

Q. Does there appear in this instrument which you have handed to me as the draft of the instrument of mortgage which Dona Concepcion Calvo was to have executed in our favor, the additions for which you were furnished data by Mr. Ortigas, as you have previously testified?

A. No, sir, they appear on this paper (presenting paper to attorney).

Mr. GUTIERREZ: That is all.

FRANCISCO ORTIGAS, a witness for the defense, being duly sworn, testified as follows:

Direct examination by Mr. GUTIERREZ:

Q. What is your name, residence and profession?

A. Francisco Ortigas, attorney, Plaza Santa Ana No. 8.

Q. Do you know Dona Concepcion Calvo, Gabriel Olives, Angeles Olives and Paz Olives?

32 A. Yes, sir.

Q. Did you intervene in any matter which was pending between Dona Concepcion Calvo and the said members of the Olives family?

A. Yes, sir.

Q. In what capacity did you intervene?

A. As the attorney of Dona Concepcion Calvo.

Q. As attorney for Dona Concepcion Calvo, was it you who drafted the terms of this instrument which I hand you (being plaintiff's Exhibit "A")?

Mr. COHN: Objected to as immaterial, incompetent and irrelevant the instrument is the best evidence; it is in evidence and admitted in all the pleadings.

JUDGE RHODE: That is preliminary.

The COURT: Objection overruled.

Mr. COHN: Exception.

A. Yes, sir, I drew it up.

Q. In pursuance of this agreement did the parties interested proceed to sell the property on the Escolta for 90,000 pesos?

A. Yes, sir.

Q. Were you present when the deed of sale was executed?

A. Yes, sir.

Q. In what capacity did you there appear?

A. As attorney for Dona Concepcion Calvo.
Q. What disposition was made of the sum paid by the purchaser?
A. To the last cent and detail, perhaps I cannot remember at this time, but in general terms the disposition was the following:
33 from the 90,000 pesos, the selling price there had to be deducted in the first place, the amount of the mortgage upon the same; likewise there had to be deducted some legacies left by Don Jose Gonalez de la Fuente which had not yet been paid and which had to be paid half by one part and half by the other, inasmuch as both parties were deraigning their title as heirs from Jose Gonzalez de la Fuente; there was deducted furthermore a small sum, I do not remember how much at this moment, which I had to paid to the registrar of property to bring up to date the title of the property, and the balance after, half was delivered to the husbands of Dona Angeles and Dona Paz Olives and to Don Gabriel Olives as the owners of the absolute title of the property. All of the legacies which had to be paid, as well as the amount of the mortgage remained deposited in the hands of Mr. Barrera and with respect to the other half, there was deducted likewise a small sum, the amount I do not remember at this moment, some thousands of dollars, which were delivered to the other parties; that is to say, Don Gabriel Dona Angeles and Dona Paz, because they had paid this sum in paying the balance of accounts on account of the properties in Ermita which are mentioned in this contract and there was likewise delivered to Senor Barrera in order that he should deliver to Dona Concepcion Calvo when the latter should execute a conditional mortgage in favor of the other contracting parties in guarantee of the due return of the sum which she was to receive, by her heirs when the time came that she should die.

Q. Did you communicate to Dona Concepcion Calvo all
34 that took place on that morning after the execution of this instrument?

Mr. COHN: Objected to as incompetent, irrelevant and immaterial.
The COURT: I will reserve my ruling.

A. Yes, sir.

The COURT: I take it that these questions are all along the same line?
JUDGE RHODE: Yes, sir.

Q. Was she agreeable to all that had been done?

Mr. COHN: Same objection.
The COURT: I reserve my ruling.

A. Yes, sir.
Q. Did you do all this under her instructions?
A. Yes, sir.
Q. What were the instructions you had from Dona Concepcion Calvo relating to the transaction in the notary office of Mr. Barrera?

A. There are some things which might be considered as secrets between attorney and client and I do not want to state those.

JUDGE RHODE: No, only with relation to this business transaction.

A. I had instructions from Dona Concepcion Calvo to pay to the Obrias Pias and to pay legacies and to deliver the part belonging to or pertaining to the other parties to the contract and to reserve the rest in the hands of Mr. Barrera.

Q. Did you talk over the amounts, that is, you and Dona Concepcion Calvo, previous to the execution of the deed of sale?

35 MR. COHN: Objected to as incompetent, irrelevant and immaterial.

Judge RHODE: We have here the gentleman who appeared for this lady in the transaction. I want the instructions he had.

MR. COHN: This is evidently an attempt to bind the plaintiff by oral testimony of what she said, when the agreement is in writing.

Judge RHODE: I want to show that there was a certain division made of the money and I want to show how it was made; if the Court feels afterwards that it has nothing to do with the contract, he may so decide, but I think the Court should have it before him.

The COURT: I will reserve my ruling.

Proceedings adjourned until 2 P. M.

Proceedings at 2 P. M.
Same appearances.

Mr. ORTIGAS on the stand.

A. Yes.

Q. What sum of money was Dona Concepcion Calvo to receive from the proceeds of the sale, according to the conversation which you had with her?

MR. COHN: Objected to as incompetent, irrelevant and immaterial.

The COURT: I will reserve my ruling until the disposition of the case.

A. I cannot state the amount exactly, but I do know that she was to receive the remainder of one-half of the price of the sale
36 of the property that belonged to her.

Q. Did she give you any other instructions?

A. Before or after the sale?

Q. Before or afterwards?

A. With reference to the time before the sale I had no other instructions than those with reference to the part which she was to receive.

Q. Do you know why one-half of the price of the sale was to be reserved for Dona Concepcion Calvo and not the entire selling price?

MR. COHN: Objected to as incompetent and irrelevant.

The COURT: Objection sustained.

Q. Did she charge you with instructions after the division?
A. Yes, sir.
Q. What were the instructions?
A. That I would have the document of mortgage prepared in favor of the other party so that she would be able to make disposition as soon as possible of that sum of money.
Q. What was the sum?

Mr. COHN: Objected to as being vague and ambiguous.

Q. What was the sum she mentioned to you with reference to which you were to draw up the document of mortgage?
A. I think it was about 32 or 33,000 pesos.
Q. Did you carry out the instructions of the lady?
A. Yes, sir.
Q. What steps did you take to carry out those instructions?
A. I made a draft of the mortgage and I went to see Mr. Martinez, the husband of Dona Paz Olives and Mr. Eduardo Gutierrez, with the object of seeing the manner in which they would accept
37 only the mortgage of two properties belonging to Dona Concepcion Calvo and I worked by instructions of my client to attempt to secure their agreement to the acceptance of thos- two properties; If I remember correctly they did not accept the two properties as sufficient security and in addition I offered them a life insurance policy made in favor of this lady and under these conditions I remember that this guarantee was accepted as sufficient by the other party.
Q. Do you know these notes which Mr. Barrera exhibited here this morning (marked Exhibit "B" for identification)?
A. Yes, sir.
Q. What are these notes?
A. After drawing up the document of mortgage by Mr. Barrera I took to Mr. Guiterrez and Mr. Martinez a copy of the mortgage to see if they agreed to it and Mr. Eduardo Gutierrez told me after having examined it, I think he examined it on one day and I returned the next, that he had some observations to make with reference to said document and these observations I wrote out and they are the contents of this document (Exhibit "B").
Q. Is this the draft of the mortgage which you gave Mr. Gutierrez and upon which he made the observations contained in the document marked Exhibit "B" for identification?
A. Yes, sir (reading it).
Q. Did you read this document to Dona Concepcion Calvo and did you inform her of the contents of the same (referring
38 to defendant's Exhibit 1)?

Mr. COHN: Objected to as ambiguous, unintelligible, does not specify time or place, there is no foundation laid witness stated that he did not read it to her that he was going to read it to her.
The COURT: Objection sustained.
Judge RHODE: Exception.

Q. How do you know that Dona Concepcion Calvo was informed of the contents of the document?

A. I will explain in detail; in the agreement it appeared that she had to execute a mortgage guarantee in favor of the other party to guarantee the money which she was to receive. I told her,the moment had arrived in which we have to draw the mortgage; she said "Very well" "I do not think that they can ask me for anything more than the two properties which I now possess, because they are sufficient guarantee for the money which I am to receive." I told her then that I believed they would not accept that, but nevertheless I would discuss with the other parties so that they will not require any greater guarantee than those two properties and I had three or four conferences with Mr. Gutierrez and the others but they were not agreeable and told me that they could not accept as a mortgage for the money two properties which were worth together exactly the same sum as the amount received by Dona Concepcion Calvo; then I asked them if it would be sufficient with an additional guarantee consisting of an insurance policy on the life of this lady
39 and they told me then that it would. I then went to see the lady and told her that I had not secured their acceptance of this as a sufficient guarantee, that is the two properties only but that they had told me that if she would add to the guarantee the life insurance policy of this lady that they would agree. I know that it caused me great deal of trouble and inconvenience because she was opposed to the idea of giving any greater guarantee but in the end she agreed to it and owing to that was the reason why I charged Mr. Barrera with the preparation of the document and why the lady knows the contents of the document.

Q. In these conversations which you had with Dona Concepcion Calvo was anything spoken of the sum which she was to receive?

A. Yes, sir.

Q. And the amount which the two properties were to guarantee?

A. With reference to the distribution of the responsibilities of the property I think that was a question of mere procedure.

Q. What was the sum spoken of in the conversations that she was to receive and for which the houses were to be given as security?

A. I think that it was about 32,000 pesos.

Q. Do you know why that document was not signed?

A. Yes, sir.

Q. Were the conditions made by the other parties accepted by Dona Concepcion?

A. No, sir, what disturbed her most was the requirements of the other parties to the contract that she insure said properties against fire because she told me then according to calculations made
40 by herself that if she had to pay in addition the fire insurance she would have very little left of the rents with which to live.

Q. But with all the other *donc*itions set out in this document apart from the conditions stated by the other parties did she accept them?

A. Are you referring to the mortgage or to the notes?
Q. To the draft of the mortgage, Defendant's Exhibit 1?
A. She agreed to the draft of the mortgage.
Q. Did you have any written authority to intervene in this matter signed by the lady?
A. Not at the beginning of my actions, but I have an idea although I am not very certain at this moment, that when she left for Hongkong I think it must have been two or three months before the sale, she left me a power of attorney in case of it being necessary to execute any document during her absence. I have stated that I am not very certain of this, but I could find out within half an hour in my office.
Q. After the sale of the property on the Escolta and after the division of the money and after the money had been left in Mr. Barrera's hands, did you render an account to this lady of the amount that was there?
A. Yes, sir.
Q. Did you also give her an account of all the legacies laid and all the accounts paid?
A. Yes, sir.

Q. Therefore she had a perfect knowledge of the amount
41 remaining in the hands of Mr. Barrera?

Mr. COHN: Objected to as leading and suggestive.
The COURT: Objection sustained.
Judge RHODE: That is all.

Cross-examination by Mr. COHN:

Q. You say that after the sale of the Escolta property you stated to Dona Concepcion Calvo the amount that remained with Mr. Barrera, after the payment of the legacies and after the payment of the indebtedness?
A. Yes, sir.
Q. How soon after the sale did you make that account *of* her?
A. I cannot state exactly but I can state certainly that I went to the lady's house every two or three days.
Q. More or less how soon after this division of the money did you go to her house and make this account to her of the amounts?
A. Certainly three days did not elapse.
Q. And on that occasion you told her the exact amount that had been paid on these legacies and how much remained in Mr. Barrera's hands?
A. Yes, sir.
Q. How did you know how much was in Barrera's hands?
A. Because I intervened in the drawing of the document I was present there.

Q. You have testified that in conversations with your client
42 before the sale, that you mentioned in those conversations the specific amount which she was to receive; you have also testified that after the execution of the sale that you mentioned to the lady the specific amount which remained in Mr. Barrera's

hands for delivery to her to enjoy in usufruct how did these two different amounts compare; were they equal or was one more than the other or less?

A. Before the execution of the deed of sale I could not tell the lady exactly what amounts would remain for her because I had not then liquidated the interested on the mortgage in favor of the Obras Pias, nor had I summed up the legacies which had to be paid nor did I know of the small legacies whether they had or had not been paid and the reason for this was to be given to us by Mr. Barrera who was the person who had intervened in the wills of all the former persons, but I did know and the lady knew that she had to receive one-half of the price of the property deducting from that half whatever of the legacies were unpaid, one-half of the mortgage to the Obras Pias and the sum which had been paid by the other party to the contract to arrange the matter with reference to the houses in Ermita and I repeat, the remainder of that half was the sum she was to receive which she knew perfectly well and which she told me.

Q. Then when you say that in your conversations before the execution of the deed of sale that sums were mentioned you are mistaken?

A. You had better read my answer because I do not remember to have made any statement as to any amounts exactly I did
43 not say that, before the drawing of the deed of sale.

Mr. COHN: Answer the question?

Judge RHODE: He don't need to answer, if he don't want to. That is badgering the witness.

Mr. COHN: If you have stated in direct examination that in the conversation between yourself and your client before the execution of the deed of sale of the Escolta property mention was made of the sum she was to receive, you are mistaken are you?

Judge RHODE: That is arguing the question with the witness. The witness should not be badgered in that way.

The COURT: A man may make a statement in the course of his examination and not be clear about it; it is not for the purpose of badgering the witness, but for the purpose of attracting his attention to his statement.

Mr. COHN: I withdraw the question.

Q. According to the written record of your testimony in this case it is made to appear that you have said that in the conversations with your client before the execution of the deed of sale of the Escolta property, mention was made of the sum which she was to receive in usufruct under this contract between herself and the Gonzalez heirs; is that statement correct?

A. Yes, sir, but I will clarify it, because I have not committed any contradiction as Mr. Cohn believes; when I stated that we had spoken of sums I wish to say that she knew a little more or less what part she was to receive, but then I said she did not know exactly, neither did I, myself, because we had not calculated
44 the interest due the Obras Pias, but she knew that it would be, little more or less, 32,000 pesos.

Q. Is that the sum which was mentioned in that conversation, 32,000 pesos?

A. Yes, sir.

Q. By what process of calculation had you arrived at that sum of 32,000 pesos?

A. It may be that there is some mistake, because from that time to the present a long time has passed and I have had no papers. Of the 45,000 pesos—one-half of the selling price of the property—there was to be deducted one-half of the mortgage and its interests, one-half of the legacies and the interests and the sum owing to Gabriel Olives and Angeles and Pas Olives, which sum they advanced in a former operation.

Q. Did you at that time know how much was due upon that mortgage to which you refer?

A. Yes, sir, at that time I had a note given me by Mr. Jose de la Rosa, attorney in fact for the Obras Pias.

Q. You are confident about that that you knew the amount of the mortgage?

A. Yes, sir, I knew it then, but I do not remember it now.

Q. Did you know the amount due upon the legacies pending payment at that time?

A. At that time, yes, sir, those which we believed had not been paid.

Q. Did you at that time know the amount that was due to
45 the Oliveses?

A. Yes, sir.

Q. Isn't it a fact Mr. Ortigas, that in authorizing Senor Barrera to make the payments of this mortgage and of the legacies that you specified to him that they would be in the neighborhood of 6,000 pesos, the mortgage and legacies together and that several days after the transaction was completed that Senor Barrera came to your — and showed you that the mortgage itself amounted to 6,000 pesos and asked for new instructions concerning these payments?

A. Yes, sir, I have an idea of that.

Q. Isn't it also true that the amount due upon the pending legacies was not ascertained from the data of payments already made for more than a month after the execution of the deed of sale?

A. I cannot remember the time, but that it resulted afterwards that there were one or two legacies more which we thought had been paid which turned out to be unpaid.

Q. You have testified in your direct examination that Senor Concepcion Calvo was in conformity with this draft of mortgage, Defendant's Exhibit 1?

A. Yes, sir.

Q. Do you mean by that that she ever saw this draft of mortgage?

A. No, sir.

Q. How do you know that she was in conformity with this draft of mortgage?

A. Because I was her attorney and she charged me with the making of that draft of mortgage.

Q. That is the way she showed her conformity with this document?

46 A. Yes, sir.

Q. You have stated, Mr. Ortigas that in your conferences with Eduardo Gutierrez, you offered in addition to the property that you were authorized to offer by your client, a policy of insurance upon the life of the Senora?

A. Yes, sir.

Q. Was that policy of life insurance then taken out?

Q. When I offered it I think it had been issued.

Q. In what sum was that policy?

A. I think it was $13,000 gold.

Q. For what purpose was that life insurance policy taken out?

A. By my advice to this lady, since the other party to the contract did not wish to purchase her usufruct from her I told her to avoid the difficulty which she placed upon me and she said "Some day after I collect this money my death may occur and my heirs will immediately have to return it, what interest will I have obtained from that money" and I told her to avoid that, take out a life insurance policy of $13,000 gold, because in that manner this money which she would receive might be disposed of with the understanding that after her death her heirs will not have their properties attached to pay this sum which you have received, because they will have this policy and with the little more they will have to find to pay that money and I told her that if she were to survive 15 years, that she would receive from the insurance company probably a greater sum than the sum she would receive from the other contracting party.

47 Q. Why did you advise her to take out a policy for $13,000 gold?

A. Because I calculated that if she would live 15 years she would collect more than the -13,000 gold and she would receive about the same sum which her heirs would have to return to the other contracting party.

Q. And this policy of life insurance was taken out before your conference with Senor Gutierrez?

A. I cannot state certainly with reference to this because on that point my memory is very poor.

Q. Now, do you know the value of the properties that Dona Concepcion Calvo offered to the Gonzalez heirs as security for this money in usufruct?

A. It would be only a private opinion because I do not know the reasonable value of them.

Q. Well, did you know their value at the time of this transaction?

A. It was merely my private opinion, I had not asked anybody.

Q. On what did you base that opinion?

A. Just by the size of the properties, because I knew the houses.

Q. What value did you place upon them in your opinion?

A. I calculated the property on Calle Solano would be worth in the neighborhood of 20,000 pesos.

Q. What price did you put on the property in Plaza Palacio?
A. I do not remember whether it was 12,000 or 13,000 pesos.
Q. Which is the larger of the two properties?
A. I think they are about the same.

Q. And you think the one on Calle Solano is much more
48 valuable than the one on Plaza Palacio?

A. Because it is new and the other is old.

Q. And it was upon this private opinion of yours from looking at the houses and knowing their superficial area that you assured Dona Concepcion in advance that they would not be accepted as mortgage security for the return of this money?
A. Yes, sir, because it is not common that a property worth about 35,000 pesos can be mortgaged for 30 or 32,000 pesos.
Q. But the only assurance which you had that these properties were worth only 32,000 pesos was from your own opinion that they were not worth more than 32,000?
A. It was my opinion, yes, sir.
Q. When did Jose Gonzalez die?
A. I think it is about three years ago.
Q. How long prior to this transaction in question had you been the attorney for Dona Concepcion Calvo?
A. I cannot state the time, but I can state that a month or a month and a half after the death of Gonzalez she requested me to act as her attorney, to which I answered that there were other relatives of hers attorneys would be more competent——

Mr. COHN: I object to the last part of the answer as to what he told her and ask to have it stricken out.
The COURT: Strike out the latter part about what witness told plaintiff.

Q. From the time of your employment up to the time of
49 the transaction in question you had been the attorney for Dona Concepcion Calvo?

A. Yes, sir.
Q. Did you represent her in the disputes between herself and the Gonzalez heirs concerning the rendition of the accounts of Francisco Gonzalez as the guardian of those heirs?
A. Yes, sir.
Q. Those questions commenced shortly after your appointment didn't they?
A. I believe so and they were concluded by the execution of this instrument of May 4th (referring to Exhibit "A").
Q. That question was, as to whether or not there was a sum of money due to the wards from the guardian or whether or not there was a balance due the guardian from the wards, was it not?
A. Yes, sir, the contrary party, the nephews of Don Francisco Gonzalez had begun by asking me for the sum of 50,000 pesos which they said was the balance in their favor from the guardianship, then they reduced the amount according as we went on discussing the matter.

Q. And it was finally settled by the execution of this instrument, Exhibit "A," was it not?
A. Yes, sir.
Q. Did you represent Dona Concepcion Calvo in the question and discussion as to the ownership of the property on Calle San Luis, Ermita?
A. Yes, sir.
Q. And that question was, as to whether or not the Gonzalez heirs were the owners of a half interest in that property or whether it belonged wholly to Francisco Gonzalez?
A. Yes, sir.
Q. And that question was settled by the execution of this instrument wasn't it (referring to Exhibit "A")?
A. I believe so, I do not remember well.
Q. I call your attention to the fifth paragraph of this instrument Exhibit "A"?
A. It was agreed in the first place that the arrangement of the difference would be settled by this clause.
Q. To whom was the Escolta property sold?
A. To the Paris-Manila.
Q. What person?
A. Gutierrez & Company.
Q. Who negotiated the purchase for Gutierrez?
A. Don Ciriaco Gutierrez.
Q. Relative of Eduardo?
A. I do not know.
Q. Who suggested the sale of the Escolta property?
A. The other party to the contract.
Q. You mean the Gonzalez heirs?
A. Yes, sir.
Q. How long before the actual sale was this sale suggested?
A. I cannot state but I calculate some months passed before the sale was actually made.
Q. What was the obstacle that during these months prevented the making of the sale?
A. I believe it was the idea of getting a better price.
Q. Was your client, Doña Concepcion Calvo anxious to sell at this price?
A. She was agreeable.
Q. From the very first?
A. I do not remember if she was agreeable to it from the first I do not remember whether she agreed from the time of the suggestion of the others, or whether some days or months passed before she agreed to it.
Q. That was not one of the matters in which you had great difficulty in convincing her was the proper thing to do?
A. No, sir.
Q. What income had Doña Concepcion Calvo been receiving from this Escolta property before the sale?
A. I think the rent of the property was 500 pesos.

Q. And what part of that 500 pesos was Doña Concepcion Calvo receiving?

A. One-half.

Q. Was that sum net or gross?

A. I do not remember at this time.

Q. What income had Doña Concepcion Calvo been receiving previous to agreeing to this sale of the Escolta property from the property on Calle San Luis?

A. I think it was 80 or 100 pesos because she collected the rent of the property on San Luis, I had nothing to do with any property except the one on the Escolta.

Q. What part of the rent of the San Luis property did Doña Concepcion Calvo receive?

A. I think she collected the entire rent.

Q. Don't you know that she received it all?

A. I cannot state for certain because a long time has passed from then until now, I was not the administrator.

52 Q. Isn't it a fact, Mr. Ortigas, that Doña Concepcion Calvo objected to the sale of the Escolta property on the ground that she would be surrendering the net income of 250 pesos by the transaction?

A. At first I think she did say that; afterwards she was convinced that the sale would be more advantageous.

Q. The time of her conviction of that was at the time of the execution of this instrument, Exhibit "A" wasn't it?

A. Yes, sir.

Q. Now, didn't she become convinced and give her consent to the execution of this instrument recognizing the surrender to the Gonzalez heirs of a half of the Ermita property and surrender her income of 250 pesos per month from the Escolta property because of the concession made by her that she should enjoy the proceeds of the Escolta property in its entirety after the payment of the debts?

A. No, sir, if you wish I will explain the lady's reasons.

Q. You have the right to explain any answer you give?

A. With reference to the houses in Ermita, those houses she told me more than six times and Mr. Barrera confirmed it also, that the money with which Don Francisco Gonzalez de la Fuenta had purchased those two properties under *pacto deretro* was the object of a sale made by the same gentleman, Francisco Gonzalez de la Fuenta of a house in Calle de Lumancia sold by said Don Francisco Gonzalez de la Fuenta to Inchausti & Company which house was one-half the property of his nephews and one-half his. Therefore she herself told me that in her conscience she recognized that one-half of the property acquired by Don Francisco Gonzalez de la Fuenta with reference to those houses in Ermita belonged to them.

53 Q. So that was the same claim made to those Ermita properties by the Gonzalez heirs?

A. Yes, sir.

Q. They based their claim to half of this property upon the same state of facts?

A. Yes, sir.

Q. And Doña Concepcion Calvo told you this on 6 or 7 different occasions?

A. Yes, sir.

Q. And during what period of time?

A. During all the time that I was disputing with them over the balance of the accounts of the guardianship.

Q. In spite of the fact that she told you her conscience would not allow her to deny their claim to half of that property you continued all this time denying that claim?

A. No, sir, nor will I permit you to address such phrases to me affecting my reputation.

The COURT: I have understood all the time that the rigid cross-examination given Mr. Ortigas was for one purpose,—to test his memory and to indicate the differences between the man's memory with reference to a given transaction and that which was reduced to a written document and the Court at no time has thought that there was any intimation that Mr. Ortigas was not a man of veracity and from my knowledge of his reputation, the Court would notwithstanding mistakes he might make in his testimony believe that he was a man of veracity. The human mind with reference to given transactions is not always and cannot preserve intact facts just as they occurred and for that reason examination and rigid cross-examination the law books say are for the purpose of developing the
54 facts, calling attention by cross-examination in order that the facts may be developed.

Mr. COHN: I will change the form of the question. I wish to explain to the witness that the rigidity of my cross-examination is more complimentary to him than against him. It is because he is a man who tells the truth that I wish to have him correct with his own lips the mistakes which he makes.

Q. If you state that Doña Concepcion Calvo recognized forthwith the claim made by the Gonzalez heirs to this San Luis property, how did it happen that their claim was made the subject of an agreement of May 4th (Exhibit "A")?

A. Because the point relative to the houses in Ermita was not touched upon by us until the moment we arrived at the agreement on the question of the guardianship, but as I stated before, the first claim by them was the balance which they said was about 50,000 pesos due them from the guardianship and then one-half of the houses in Ermita, and the moment in which they accepted my statement that there was no balance of any nature in favor of or against them, then we entered upon the second point and stated this has been admitted.

Q. You drew up this agreement didn't you of May 4th, 1903?

A. Yes, sir.

Q. And you knew of its execution didn't you?

A. Yes, sir.

Q. Did you ever receive any instructions from Doña Con-
55 cepcion Calvo to depart from or vary the terms of this agreement?

A. After it was made and signed?

Q. After its execution?

A. No, sir, not after its execution.

Q. You never received any instructions to vary or depart, or in conflict with this contract, Exhibit "A"?

A. No, sir.

Q. There never was any discussion or negotiations concerning the change or variance of the terms of this contract was there?

A. No, sir, on the interpretation of the agreement we have always been of accord.

Q. Did your client ever state to you that she had consented to or agreed upon a change in the terms of this agreement that she had signed?

A. No, sir, she never told me anything.

Q. Why at the time of the execution of this sale, Mr. Ortigas, did the unusual procedure take place of taking the deed of sale into the adjoining room to be signed by Doña Concepcion Calvo?

A. I will explain that. Dona Concepcion Calvo had a slight disagreement with the other party to the contract and when she arrived at Mr. Barrera's office she called for me to come to the ante-room and told me that she did *did* not wish to enter and have to see the others who were in there and asked me if there would be any objection to her signing in another room; I asked Mr. Barrera and he said that he had no objection and Mr. Barrera and I and she passed into another room.

Q. Do you remember the occasion when you met *Senor*
56 Concepcion Calvo in passing along the street and directed her to go to the office of Senor Barrera and examine the proposed mortgage?

A. I do not remember.

Q. I understand that you have stated that in this transaction of the sale of the Escolta property that you gave complete and full account of that to your client, Doña Concepcion Calvo within a comparatively short time, two or three days after the occurrence?

A. Yes, sir.

Q. Do you remember that you gave her account of all the transactions?

A. I told the lady that the remainder of one-half had been delivered to the other party and that there had been deposited in the hands of Mr. Barrera for the payment of the mortgage and the legacies and that Mr. Barrera would settle with all the legatees and prove if in reality the legacies had been paid, or if there was anything which they had not as yet collected.

Q. Was there any feature of that transaction of the sale of that Escolta property that you did not report to your client?

A. I believe not.

Q. Was there not as a result of that sale a monthly payment that was required to be paid to the tenant of the property by reason of the increase in the rent after the sale?

A. That occurred after the sale; I will explain that in detail, if you wish. There was a contract with reference to that property of

57 lease made by the deceased Francisco Gonzalez de la Fuenta which contract of lease is still in force. Before the sale we saw the purchaser and asked if he wished to agree to observe the time which still remained under the contract of lease and the purchaser did not wish to respect that part of the contract. I told the lady then that the sale involved the danger that afterwards the tenant would claim damages against the heirs of Don Francisco Gonzalez de la Fuenta, who were the Olives children, and the lady, because it was to be presumed that the purchaser would fix another rental on the tenant. This was a probable damage that might occur, but I also said that if we did not sell the property it would be very difficult to find afterwards another purchaser because already the property did not have the same value which they had had at the beginning of the American operation, and that I in my opinion thought it was preferrable to incur the danger of the claim for damages which might be made by the tenant than the danger of not finding another purchaser. The more so, as the deceased Don Francisco Gonzalez de la Fuenta had some accounts pending with the tenant of the house which said tenant wished to collect in a sum which, according to his statement was owing to him by Mr. Francisco Gonzalez de la Fuenta and I accepted that on account of the interest which the tenant had in arranging these matters that either he would not claim damages or that he would claim an amount relatively small and for that I was inclined to trust the sale. After executing the deed of sale in the terms formerly stated, to-wit:—without the purchaser respecting the pending lease,

58 a month afterwards I think it was the purchaser wrote a letter to the tenant increasing the rent to a considerable extent; with reference to this the tenant filed a complaint for damages but fortunately he is a friend of mine and I went to see him and I arranged the matter in the best manner possible which was, obligating ourselves to give him 100 pesos per month during such time as he could not find another place which would be more convenient for him and our obligation to pay him not to exceed the time which remained for the expiration of the lease. In this transaction I was authorized by the other contracting party, the Olives children and with reference to the lady, I knew perfectly well that she would not wish to pay the tenant even 20¢, but to avoid a law suit in which we had the losing part and under my exclusive responsibility I made the compromise with the tenant Mr. Roensch. After the compromise I gave account to the Olives children who agreed as a consequence to pay 50 pesos per month and to the lady, as I was certain that she would not pay and as I desired to finish as soon as possible all the business of this lady, I told her that the other parties or the Olives children, had agreed to pay the 100 pesos per month so that she could not say nothing about me, nor would she have to consider herself indebted to me for the 50 pesos per month, which I paid out of my own funds.

Q. Then you paid on account of this obligation of Doña Concepcion Calvo to the tenant the sum of 50 pesos per month?

A. Yes, sir.

59 Q. And instead of telling her that you were paying this money you told her the entire payment was being made by the Gonzalez heirs?

A. Yes, sir, so that she would not even have to feel indebted to me for that favor.

Q. She had obligated herself, had she not, to pay her proportional part to the tenant of any increase in his rent?

A. No, not of any increase, I have already stated that all the damages were reduced to 100 pesos per month until the end of the lease, but if before that time the tenant could find another locality more convenient for him that from the moment in which the tenant moved the obligation to pay him 100 pesos per month would cease.

Q. What I mean by the question is this, that you as attorney at law were aware that Doña Concepcion Calvo was under the legal obligation to recognize this claim of the tenant?

A. Yes, sir.

Q. And you made this obligation personally, without giving Doña Concepcion Calvo an opportunity of meeting it herself?

A. Yes, sir, I did not tell her anything about the fact that I was paying.

Q. Did you tell her that you had signed her name to an agreement to pay that sum?

A. I believe I did.

Q. When did you tell her that?

A. I told her that the day following or perhaps two days after signing the agreement with Mr. Roensch.

Q. Isn't it a fact Mr. Ortigas, that *Senor* Concepcion had no knowledge of this payment until a bill for one month's in-

60 stallment was sent accidentally to her instead of to you?

A. No, sir, she when she was by mistake sent one of these receipts, found out then that I was the person who was paying the money.

Mr. COHN: That is all.

Redirect examination by Judge RHODE:

Q. Did the plaintiff, Doña Concepcion Calvo make any claim against these defendants for costs incurred during their minority, that is while her husband was tutor?

A. When Messrs. Gutierrez formulated their first petition I told then to Doña Concepcion Calvo, that even supposing that her husband as guardian had expended money for the necessities of those minors amounting to a greater sum than the income of the same, she could not claim that difference so long as her husband had not even been authorized by the family council to expend the total amount of the income, therefore in such a situation the most we could expect was to liquidate the accounts of the guardianship without any balance whatever, either in favor of or against, and for that reason she did not make the claim of any kind.

Mr. GUTIERREZ:

Q. Can you state what were the properties left by Mr. Gonzalez at his death?

Mr. COHN: Objected to as irrelevant and immaterial and not the best evidence. What is the purpose?

Judge RHODE: We surmise from the strain of the examination of Mr. Cohn that he intends to prove by the testimony ad-
61 duced that there was some kind of a compensation for this unheard of and inexplicable payment of 45,000 pesos to this lady during her lifetime. We want to see what property her husband left so your Honor may have before you the absolute fact that there was absolutely no possible compensation. That it would be a gift without the least consideration. That is the intent.

Mr. COHN: I do not think this witness is competent to testify to that. It is not the best evidence. The probate proceedings would be the best evidence, and the inventory.

Judge RHODE: If he knows.

The COURT: Objection overruled.

Mr. COHN: Exception.

A. Half of the property on Calle Palacio, half of the building on the Escolta, the sale of which has been discussed here, two houses acquired by him by purchase under *pacto deretro* in Ermita, but these two houses he sold again under *pacto deretro* in favor of Julian La O, and after the sale he purchased the house in Calle Solano which he left as a legacy in absolute ownership to his widow. In addition he left half of the estate of Pasacao and the furniture in the house, clothing, etc.

Q. Is that all that he had?

A. Yes, sir, and I found among his papers two shares of the "Democracia" of 25 pesos each.

Judge RHODE: That is all.

Recross examination by Mr. COHN:

Q. Did you have the data from which to prepare the accounts of the expenditures made by Francisco Gonzalez during his
62 lifetime on behalf of the minor children who were his wards?

A. His widow delivered to me a trunk full of papers among which were mixed a series of documents which had no relation with the guardianship and I devoted myself during some two or three months, two or three hours each day to separating all those documents which could be related to the guardianship as for example, the drafts forwarded to Gabriel Olives who was in Spain and I separated the first and second letters of exchange and the account of the Paris-Manila for articles purchased for the children, dentists' accounts, etc. and all that was separated to see if by that means I could prepare an account of the expenses made for the minors.

Q. But was any account showing the balance one way or the other ever made?

A. Fortunately we did not make any, because before we arrived

at that stage the other party had agreed to accept that liquidation of accounts without any balance one way or the other.

Q. That agreement you refer to is this reduced to writing on May 4th (referring to Exhibit "A")?

A. Yes, sir.

Q. This whole matter was compromised then between all the parties without making up any accounts?

A. Yes, sir, without any account.

Mr. COHN: That is all.

Judge RHODE: That is all.

The defense rests.

63 *Rebuttal for the Plaintiff.*

ENRIQUE BARRERA, recalled for the plaintiff.

Direct examination by Mr. COHN:

Q. When you were instructed to pay the Obras Pias mortgage upon the Escolta property, to pay Mr. Roensch the amount of the indebtedness to him and to pay the balance due upon certain legacies of the estate of Jose Gonz-lez de la Fuenta, were you given specific instructions as to the amounts of these credits against the estate?

A. No, sir.

Q. Why not?

A. Because I suppose the amounts were not known because it was necessary for me to go to the attorney in fact of the Obras Pias in person to find out what was the amount of the mortgage due and it was necessary for me to go in person to the legatees to find out what was the sum of the legacies unpaid and with reference to the sum of money to Mr. Roensch, I did not pay him directly, I paid the amount to Mr. Ortigas who asked me for it and gave me a receipt which I hold in my possession.

Q. Did they when you were instructed to make these payments attempt to approximate the amount?

A. Yes, sir.

Q. In what sum did they approximate the amount?

A. Some 6,650 pesos, I am not certain of the fraction.

Q. What bill did you pay first?

64 A. The one to Mr. La Rosa, the attorney in fact of the Obras Pias.

Q. What was the date of that payment?

A. The 13th of August, 1903.

Q. What was the amount of that payment?

A. 5,968.55 pesos.

Q. What did you do when you learned from Senor la Rosa that the debt of the Obras Pias was almost as much as the entire amount that had been approximately calculated by the interested parties from whom your instructions came?

A. I advised Mr. Ortigas and informed him of the facts stating to him that with the sum deposited with me to pay the credit to the

Obras Pias and a part of the legacies which had not been paid which were the only obligations I had contracted personally that the amount deposited with me was not sufficient and Mr. Ortigas stated to me that by agreement with the other interested parties I should pay these obligations, taking the difference from the other sum which I had in my possession.

Q. When did you make the last payment to the legatees of Jose Gonzalez?

A. The 11th of September, 1903.

Q. How long prior to that payment did you know the amount owing to that legatee?

A. I knew previously because as I have already stated I went personally to see those interested parties because in the data given to me it appears that all the legacies had not been paid and I went as I have stated to see the interested parties and find out what was pending payment and in view of this statement which was made
65 during the period of several days because I did not do it all at once, was when I consulted Mr. Ortigas.

Q. How soon after learning the amount due to the legatees did you make the payment to them?

A. Immediately upon being authorized by Mr. Ortigas.

Mr. COHN: That is all.

Cross-examination by Mr. GUTIERREZ:

Q. Are you certain that it was only 6,000 odd pesos left with you?

A. I cannot state exactly at this moment because I have not the note with me, I can bring it but I am very sure that there were four checks issued, I am not certain, and for that reason I did not say, I can bring it tomorrow, one of the sums was for $6,000 a-d the other sums I cannot state. I cannot state the amount until I bring the note.

Redirect examination by Mr. COHN:

Q. At any rate whatever may have been the sum designated by the parties for the payment of the debts, it was only the amount owing to the Obras Pias that you were called upon to go to Senor Ortigas for fresh authorization?

A. Yes, sir, because I was only given a fixed sum of money and I did not dare to pay out any larger sum and I went to see Mr. La Rosa the following day and Mr. La Rosa showed me the liquidation and from that liquidation it appeared that there was 5,900 and odd pesos and being informed of that amount and of the amount owing to the legatees which amounted to more than the sum deposited with me I then went to Mr. Ortigas so he could decide this
66 question by agreement with the interested parties; the same thing occurred with reference to the payment of Mr. Roensch which Mr. Ortigas stated to me that he had an agreement with the interested parties to pay that credit with the balance remaining in

my possession and to that effect I sent him the amount and he forwarded me this receipt which I have.

Mr. COHN: That is all.

The plaintiff, DOÑA CONCEPCION CALVO, being recalled, testified as follows:

by Mr. COHN:

Q. When did you learn for the first time that the amount which had been left for Senor Barrera to deliver to you in usufruct upon the execution of a mortgage was one-half of the remainder of the proceeds of the sale?

A. After deducting all those payments, was what was to be given to me.

Q. When did you learn for the first time that the amount actually left in Senor Barrera's hands was only one-half of the selling price?

A. When I went to read the document. The document which I did not want to sign, it was then I was informed of the amount.

Q. Do you refer to the *escritura* of mortgage, Defendant's Exhibit 1?

A. Yes, sir.

Q. After the execution of the deed of sale were you informed by Senor Ortigas of the amount of money left in possession of Senor Barrera for delivery to you?

67 A. No, sir, I stated before that he did not tell me anything.

Q. When the sale of the Escolta property was first proposed to you did you agree to it?

A. No, sir, not the first time nor the second, nor the third.

Q. How long a time elapsed before you have your consent to that sale?

A. Two or three months.

Q. What caused you to change your mind and consent to the sale after having refused for two or three months?

A. To wind up the case and I signed the contract of sale by virtue of that contract.

Q. When did you first admit the claim of the Gonzalez heirs to the ownership of one-half of the Ermita property?

A. I do not know, I just heard that from Mr. Ortigas when we made that contract.

Q. The contract you refer to is this contract of partition between yourself and the Gonzalez heirs, (referring to Exhibit "A").

A. Yes, sir, the same.

Mr. COHN: That is all.

Cross-examination by Judge RHODE:

Q. Read paragraph 5 of this agreement Exhibit "A"?

A. I did that in compensation of what they were going to give me from the proceeds of the sale of the property on the Escolta, but the expenses of the doctors and drug stores covered by the last illness were pending and so as not to enter into a law suit on those accounts.

Q. Then you were very well informed of the contents of
68 this 5th paragraph on signing the contract?
A. I was very well informed.
Q. Do you mean to state now that you stated in this fifth paragraph a falsehood.

Mr. COHN: Objected to as improper, incompetent and irrelevant.
The COURT: I think it is better to ask her questions and draw out the facts. The Court will make the deductions. Objection sustained.
Judge RHODE: Exception.

Q. Is it not true that in the month of November, 1903, in the City of Manila you requested of Padre Manuel Alonzo vice-rector of the University of Santo Tomas that he should go to Mr. Gutierrez and the other defendants in this case and induce them to accept the security offered in this mortgaged marked Defendant's Exhibit 1 as security for about 32,000 pesos?
A. I do not remember that.
Q. You cannot swear that it is not true; it may be that you are mistaken about that, or may have forgotten it?
A. I do not remember it I have often spoken privately to that gentleman and I may have spoken to him about that, I do not remember.

Redirect examination by Mr. COHN:

Q. Did you ever in your conversations with Padre Alonzo state to him that the amount which you had to guarantee to the Gonzalez heirs was 32,000 pesos?
A. Never.

Mr. COHN: That is all.

The plaintiff rests.
Evidence closed.

69 I hereby certify that the foregoing is a true and correct transcript of the evidence taken by me in the above entitled case.

____ ____,
Official Reporter.

Se unirán originales á este Bill de Excepciones los exhibits "A" "B" y "C" de la demandante y los exhibits "D" y exhibit 1 de los demandados.
El dia 15 de Noviembre de 1904 el Juzgado dictó la siguiente sentencia.

70 THE UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance, City of Manila.

Part III.

Case No. 2333.

CONCEPCION CALVO
versus
ANGELES O. DE GUTIERREZ and Her Husband, EDUARDO GUTIERREZ; GABRIEL OLIVES, PAZ O. DE MARTINEZ and Her Husband, MANUEL MARTINEZ.

This case came on for hearing upon the complaint, answer, exhibits and proof. Exhibit "A," attached to plaintiff's complaint, is a contract between the plaintiff and defendants dividing the property therein mentioned, which contract is in the words and figures following:

"The undersigned, Angeles and Paz Olives, in the presence of their respective husbands, and Gabriel Olives, as heirs of certain property of Francisco Gonzalez de la Fuente, and Concepción Calvo, as usufructuary heiress of the said Gonzalez, agree upon a division of the inheritance, the principal conditions of which are as follows,—

First: The property No. — on the Escolta, half of which belonged to the testator, shall be sold at a price not less than Ninety Thousand Dollars.

Second: From the proceeds of the sale there shall be paid
71 to the Pious works, the amount owing Mr. Roensch, that owing Julian La O. and the unpaid legacies made by José Gonzalez de la Fuente.

Third: The remainder shall be turned over to Doña Concepcion Calvo to be used by her as usufructuary heiress after she has given a mortgage bond (fianza hipotecaria).

Fourth: Concepción Calvo relinquishes her right to reimbursment of the amounts expended by her on account of the last illness and the burial of the testator. But in compensation fir this she shall have all the movable property of the testator with the exception of a set of buttons, etc., etc., belonging to the testator's father, which shall go to Gabriel Olives as the only male grandson.

Fifth: With regard to the pieces of property purchased by the testator from Pantaleona Rivera, which were paid for by money half of which belonged to the testator and the other half to the heirs of Paz Gonzalez, Concepción Calvo recognizes the said heirs as absolute owners of the half of the interest of the testator in and to the said property.

Six: Angeles, Paz and Gabriel Olives respect the legacy of the testator to Concepción Calvo, and acknowledge her right to enjoy the usufruct of half of the house No. 97 Calle Palacio, and half the interest of the Ermita houses.

Seventh: Gabriel, Angeles and Paz Olives renounce all rights

they may have as wards of the testator to require a rendering of accounts of any kind.

Eighth: Concepción Calvo shall be entitled to claim from Pantaleona Rivera whatever taxes she mat have paid for the Ermita houses after the death of the testator.

In witness whereof, we sign the present document in Manila, this fourth day of May, 1903.

72 (Signed) CONCEPCION CALVO,
ANGELES O. DE GUTIERREZ,
EDUARDO GUTIERREZ,
GABRIEL OLIVES,
PAZ O. DE MARTINEZ, AND
MANUEL MARTINEZ."

The defendants earnestly insist that the Court construe the contract, Exhibit "A" to the effect that the defendants are entitled to half of the 90,000 pesos, the proceeds of the sale of the Escolta property, the other half to go to the plaintiff, less the debts provided for in the second paragraph thereof.

The defendants offered to prove by oral testimony the transactions between the parties, in order to aid the Court in the construction of the said contract, Exhibit "A" and the intention of the parties in its execution. The language of this document, Exhibit "A" is perfectly clear and explicit. There is nothing ambiguous about it, nor is the language in any way technical and is not susceptible of the construction insisted upon by the defendants. It is the duty of the Court to construe the whole document together and enforce the intention of the parties found therein.

It is a cardinal rule in the construction of contracts that the intention of the parties is to be inquired into and, if not forbidden by law, is to be effectuated. The great object, and, indeed, the only foundation of all rules for the construction of contracts is to come at the intention of the parties. There is no equitable construction of an agreement distinct from its legal construction. The error of the parties cannot control the effect of the instrument where its meaning is clear. Instrument will stand as written, if deliberately adopted by the parties, even if they mistook its legal intent. The Court will not assume to make a contract for the parties which they do not cho-se to make for themselves. A distinction is to be observed between the construction of a contract and the correction of a mistake. If there is a mistake in a written contract so that it does not express the intent of the parties, equity will reform it so as to make it carry out that intention upon proper allegations and proof.

73 It is clear from the proof in this case that the plaintiff and defendants clearly understood the provisions of the document, Exhibit "A." It is what the parties agreed to at the time of its execution and is the result of their negotiations. The Court finds,—

I.

That the Escolta property was sold for the sum of 90,000 pesos and that all the debts and legacies, with the exception of the debt

of Julian La O, provided for in the second paragraph were paid out of said fund, the said debts and legacies so paid out of said fund amounting to 11,741.53 pesos Mexican currency.

II.

That the Ermita property was redeemed by Rivera for 15,000 pesos, one-half of which, to-wit:—$7,500 the plaintiff was entitled to under the provisions of said contract Exhibit "A," but the defendants collected all of said sum of 15,000 pesos, no part of which has been paid over to the plaintiff.

III.

That the defendants received of the proceeds of the Escolta property 45,892.50 pesos. Add this to the 7500 pesos belonging to the plaintiff of the proceeds of the redemption of the Ermita property and it aggregates 53,392.50 pesos.

IV.

That the defendants paid out of the proceeds of the redemption of the Ermita property to Julian La O, debt amounting to 12,000 pesos, deducting which sum from the 53,392.50 pesos above mentioned it leaves the sum of 41,392.50 pesos Mexican currency and this sum at the rate of $1.11 Mexican currency for each $1.00 Philippine Currency, which sum the defendants are due the plaintiff for use during her life, to be so secured as to insure it to the defendants upon the death of plaintiff, as per the terms of the contract, Exhibit "A."

74 The Court further finds, as per the terms of the contract, Exhibit "A" that the plaintiff is entitled during her life to the use of a one-half interest in the property 97 Calle Palacio, Walled City and to the use of a one-half interest for life in the Hacienda Pasacao. It is, therefore,

Ordered by the Court that the defendants Angeles O. de Gutierrez and Eduardo Gutierrez, her husband, Gabriel Olives, Paz O. de Martinez, and Manuel Martinez, her husband, pay into the Clerk of this Court the said sum of $37,290.54 Philippine Currency on or before the 1st day of December, 1904.

The Court further finds that the plaintiff, after paying out of the fund that was left in the hands of Barrero, to-wit:—the sum of 44,107.50 Mexican Currency, all the debts and legacies provided for in the second paragraph of Exhibit "A," except the Julian La O. debt, which debts and legacies amounted to 11,741.53 Mexican currency, has left in the said Barrero's hand and which is now in the hands of C. C. Cohn, as received in this case, the sum of 32,365.97 pesos Mexican Currency, which sum at the rate of $1.11 Mexican currency for each $1.00 Philippine Currency is equivalent to the sum of $28,257.63 Philippine Currency and this added to the $37,290.54 Philippine Currency aggregate a total of $65,548.17 Philippine Currency to be disposed of under the orders of the Court,

the disposition of which is reserved until said sum of $37,290.54 Philippine Currency is paid in by the defendants.

Dated, Manila, P. I., November 1904.

(Signed) JOHN C. SWEENEY, *Judge.*

(Copy)

75 To this judgment the defendants duly took exception.

On the 16th day of November, 1904, they presented their motion for a new trial in the following terms:

Now come the defendants and ask the Court to annul the judgment in this cause and that they be granted a new trial, for the following reasons:

1. The facts and evidence are not sufficient to justify the judgment or sentence.

2. The judgment or sentence is contrary to law.

On the 19th day of November the Court having heard the parties denied the motion for a new trial, to which order the defendants duly excepted.

Assignment of Errors.

The Court erred in rendering judgment against the defendants.

The Court erred in denying the motion for a new trial.

I, John C. Sweeney, judge of First Instance of the City of Manila, approve the foregoing bill of exception and certify that the same contains all the facts and proceedings in this case, and order that in consideration of the facts proven in this action, the defendants be required to file a bond in the sum of 45,000.00 to secure the execution of the judgment rendered in this action during the appeal.

JOHN C. SWEENEY, *Judge.*

Received copy.
COUDERT BROS.

I, José McMicking, Clerk of the Court of First Instance of
76 the City of Manila, certify that the foregoing bill of exceptions consisting of 97 pages is the original bill of exceptions presented and approved in this action.

In testimony whereof I have hereunto set my hand at Manila this 28th day of December, 1904.

J. M. McMICKING, *Clerk.*

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 29th day of Dec., 1904. 8:50 a. m.

J. E. BLANCO, *Clerk,*
By H. D. McGEORGE, *Deputy.*

77 PLT'F'S EXHIBIT A. McD.

Los que suscriben, Doña Angeles y Doña Paz Olives con asistencia de sus respectivos maridos y Don Gabriel Olives, como herederos en unas propiedades de D. Francisco Gonzales de la Fuente, y Doña Concepcion Calvo, como heredera usufructuaria del mismo Sr. Gonzales, convienen en una particion de la herencia cuyas principales bases son las siguientes:

Primera. La finca No. — de la Escolta cuya mitad pertenecia al causante se venderá á un precio que no baje de Noventa Mil Pesos.

Segunda. Del producto de la venta se pagará el debito á las Obras Pias el debito al Sr. Roenhs, asi como el debito á Don Julian La O, y los legados pendientes de pago, hechos por Don José Gonzales de la Fuente.

Tercera. El remanente se entregará á Doña Concepcion Calvo, para que lo disfrute como heredera usufructuaria previa prestacion de fianza hipotecaria.

Cuarta. Doña Concepcion Calvo, renuncia á los gastos abonados por la misma, ocasionados por la ultima enfermedad y entierro del causante; pero en compensacion se le adjudica todos los bienes muebles del causante, excepcion hecha de una botonadura etc. etc. pertenecientes al padre del causante, los cuales se adjudican á Don Gabriel Olives como unico nieto varon.

Quinto. En cuanto á las fincas compradas por el causante á Doña Pantaleona Rivera como lo fueron con dinero perteneciente al causante en una mitad, y á los herederos de Doña Paz Gonzales en la otra, Doña Concepcion Calvo reconoce á dichos herederos como
dueños absolutos de la mitad del interes del causante en las
78 sobredichas fincas.

Sesta. Doña Angeles Doña Paz y Don Gabriel Olives respetan el legado hecho por el causante á Doña Concepcion Calvo asi como reconocen su derecho á usufructuar la mitad de la casa de la Calle Palacio No. 97, una mitad de la hacienda de Pasacao, y la mitad del interes de las casas de la Ermita.

Septima. Don Gabriel Doña Angeles y Doña Paz Olives á su vez, renuncian á todos cuantos derechos puedan tener como pupilos que fueron del causante y á exigir cuentas de ningun género.

Octava. Doña Concepcion Calvo, tendrá derecho á reclamar de Doña Pantaleona Rivera cuantas contribuciones hubiese abonado por las cases de la Ermita, con posterioridad al fallecimiento del causante.

Y para que conste firmamos el presente documento en Manila á cuatro de Mayo de 1903.

ANGELES O. DE GUTIERREZ. CONCEPCION CALVO.
EDUARDO GUTIERREZ. GABRIEL OLIVES.
PAZ O. DE MARTINEZ.
MANUEL MARTINEZ.

79 *Translation of Exhibit "A."*

The undersigned, Angeles and Paz Olives in the presence of their respective husbands, and Gabriel. Olives, as heirs of certain property of Francisco Gonzalez de la Fuente, and Concepcion Calvo as usufructuary heiress of the said Gonzalez, agree upon a division of the inheritance, the principal conditions of which are as follows:—

First. The property No. — on the Escolta, half of which belonged to the testator, shall be sold at the price not less than Ninety thousand dollars.

Second. From the proceeds of the sale there shall be paid the amount owing to Pious Works, the amount owing Mr. Roensch, that owing Julian La O, and the unpaid legacies made by José Gonzalez de la Fuente.

Third. The remainder shall be turned over to Concepcion Calvo to be used by her as usufructuary heiress after she has given a mortgage bond, (fianza hipotecaria).

Fourth. Concepcion Calvo relinquishes her right to reimbursement of the amounts expended by her on account of the last illness and burial of the testator. But in compensation for this she shall have all the movable property of the testator with the exception of a set of buttons *ect ect* belonging to the testators father which shall go to Gabriel Olives as the only male grandson.

Fifth. With regard to the pieces of property purchased by the testator from Pantaleona Rivera, which were paid for by money half of which belonged to the testator and the other half to the heirs of Paz Gonzalez, Concepcion Calvo recognizes the said heirs as absolute owners of the half of the interest of the testator in and to the said property.

Sixth. Angeles, Paz and Gabriel Olives respect the legacy of the testator to Concepcion Calvo, and acknowledge her right to enjoy the usufruct of half of the house No. 97 Calle Palacio, half
80 of the estate of Pasacao, and half the interest of the Ermita houses.

Seventh. Gabriel, Angeles and Paz Olives renounce all rights that they may have as wards of the testator to require a rendering of accounts of any kind.

Eighth. Concepcion Calvo shall be entitled to claim from Pantaleona Rivera whatever taxes she may have paid for the Ermita houses after the death of the testator.

In witness whereof, we sign the present document in Manila this fou-th day of May, 1903.

CONCEPCION CALVO.

ANGELES O. DE GUTIERREZ.
EDUARDO GITIERREZ.

GABRIEL OLIVES.

PAZ O. DE MARTINEZ.
MANUEL MARTINEZ.

81 PLAINTIFF'S EXHIBIT "B."

1. The heirs to return within four months paying 15% interest.
I. Solana property $13,000; Plaza Palacio property $7,000, and for the balance of policy.
II. Costs of deed and registration and cancellation to be on account of Concha.
III. The property shall be insured, the first on $10,000 and the other on $5,000.
IV. The policies to the heirs, who in case of accident shall retain the amount until the mortgage has been amplified, and if no payment the heirs will satisfy it and shall have the right to claim from him the interest 15% annually—agrees to pay taxes within the times required.
V. In case of condemnation proceedings (eminent domain) they may take charge of the amount of the indemnity until their security has been completed.
Non-payment of the insurance premium equal to the insurance of the properties.
VI. The non-compliance of the obligation to pay Court fees.
VII. Eduardo to be the only attorney in fact to Gabriel.

82 EXHIBIT C.

Know all men by these presents: That I, Doña Concepcion Calvo y Gay, of legal age, widow of Don Francisco Gonzalez de la Fuente y Esquivel, employed in the ordinary occupation of my sex, and a resident of the City of Manila, Philippine Islands, do depose and declare:—
First. That by means of a written instrument executed on the 21st day of June, One thousand eight hundred and thirty-nine, before the Notary (of Indies by Royal Decree) Don Esteban Salanova, Don Matias Sainz de Vismanos in his capacity as Attorney-in-fact of Don Rafael Dias Arenas, sold to Don José Gabriel Gonzalez Esquivel as guardian of the minors Don Juan, Don Pedro and Doña Antinia de la Fuente, and as representative of Doña Ignacia, Doña Josefa and Doña Francisca de la Fuente, persons of legal age and sisters of the minors above mentioned, for the sum of three thousand one hundred and forty pesos, a building of masonry construction situated on Calle (Street) Escolta of what was then known as the town and now known as the District of Binondo, under the condition that the vendor, Señor Arenas, could repurchase the property for the same price within the period of two years.
Second. By another instrument also executed in this City on the twentieth day of July, one thousand eight hundred and fifty, before the Notary Don Lino Clemente Reyes, Señor Don Felipe Maria Govantes in his capacity of Alcade Mayor Tercero of what was then known as the province and now the District of Tondo, and in the name of the heirs of Don José Ravago, deceased, sold to

the said Don José Gabriel Gonzales Esquivel, as the highest bidder, and for the sum of two thousand two hundred and five pesos another building of masonry construction with its lot, situated on
83 Calle (Street) Escolta, facing on the opposite side of said street the house of Don José Orbesna, bounded on the left by the house of Doña Feliciana de Valencia, and at the rear of a lot belonging to Doña Rafaela Doyle.

Third. That subsequent to the acquiring of said properties the said Don José Gabriel Gonzalez y Esquivel applied to the Alcaldia Mayor Tercera (superior Court of the third district) of this province, stating that in the year one thousand eight hundred and thirty-nine he had purchased as guardian of the minors Doña Antonia, Don Juan and Don Pedro de la Fuente, and of the elders Doña Ignacia, Doña Josefa and Doña Francisca de la Fuente, of Don Rafael Diaz Arenas, a house of masonry construction with its lot, situated on the Escolta, and having torn down said house and constructed on the same lot another one adjoining, of his own property, a larger building, having agreed previously with the owners of the first property, who at that time were of legal age, to pay them in cash the amount of their respective shares or participations in the same, after having given to it a greater value, to-wit,—six thousand three hundred and ten pesos; and to establish this fact and also that of the construction of the new building, and for the purpose of obtaining title of ownership to the whole property he requested the Court to take depositions from the above mentioned Doña Ignacia and Doña Francisca de la Fuente and from Don Francisco, widower of Doña Antonia de la Fuente, in regard to the fact of the delivery of the amounts of the respective participations of all the interested parties to the first mentioned property, and from the persons whom he named and who had taken part in the construction of the house, and the proper legal proceedings having been had an order was dictated on the fifth day of February of the year one thousand eight hundred and fifty-seven by
84 Señor Don José Maria de Villanueva, then Alcalde Mayor Tercero of this province, declaring the house and lot mentioned, situated on the Escolta, District of Binondo, to be the property of Don José Gabriel Gonzalez y Esquivel.

Fourth. The said Don José Gabriel Gonzales y Esquivel died, leaving a will executed on the twenty-fourth of August of the year one thousand eight hundred and eighty before Don Tomás Velasco, then Notary of this City, in which last will he designated at his general (universal) heirs, his three children had by him with his one and only wife, Doña Francisca de la Fuente y Salamanca, deceased, whose names were Doña Maria de la Paz, married to Don Sebastian Olives y Sintes, Don José Julio and Don Francisco Hilarion, all surnamed Gonzales y de la Fuente.

Fifth. The heir Don José Julio Gonzales y de la Fuente also died, leaving a will executed on the twenty-fifth of September of the year one thousand eight hundred and ninety-one, before the Notary Enrique Barrera y Caldes, in which will he designated as heir to one half of all his property, actions and rights, his brother Don

Francisco Gonzales y de la Fuente, and as heirs to the other remaining half his nephew Gabriel and his nieces Maria de los Angeles and Paz, children of his deceased sister Doña Maria de la Paz Gonzales y de la Fuente and her husband Don Sebastian Olives.

Sixth. The heir Don Francisco Gonzales de la Fuente y Esquivel died also, leaving a will executed on the third day of July of the year one thousand nine hundred and two which was admitted to probate by the Court of First Instance of this City by an order rendered on the seventeenth of the following September, and in which last will the testator, declaring that he had no ascendents nor descendants neither legitimate nor natural, bequeathed to his
85 wife, the deponent, Doña Concepcion Calvo y Gay, the usufruct of his properties, rights and actions, and designated as the general (universal) and only heirs to the title of same his nephew Gabriel and his nieces Angela and Paz Olives y Gonzales de la Fuente.

Seventh. The third heir, Doña Maria de la Paz Gonzales Esquivel de la Fuente, died intestate, and after the proper proceedings were had, her children, the above mentioned Don José Maria Gabriel, Doña Maria de los Angeles and Doña Maria de la Paz Olives y Gonzales, were declared by a decision dictated on the seventeenth of the present month by the Hon. A. S. Crossfield, Judge of the Court of First Instance of this City, to be her intestate heirs.

Eighth. That by virtue of the titles originating in the above described acquisition of the property the deponent, Doña Concepcion Calvo y Gay and her nephew and nieces-at-law Don José Maria Gabriel, Doña Maria de los Angeles and Doña Maria de la Paz Olives y Gonzales, are now co-owners of the undivided above described property, the usufruct of the same pertaining to the deponent, and the title of ownership of said half and the absolute dominion over the other half pertaining in equal shares to the said nephews and nieces of the deponent. With the object of recording their respective rights in the Registry of Property I certify to the following description of the property as it now exists, and other requisites provided by the Mortgage Law:

(A) That the said property is urban or city property, consisting of a lot and of a house of strong materials with galvanized iron roof erected on same, known formerly as No. 21 and at the present time as Nos. 71 to 75 (Street numbers), fronting on Calle (Street) Escolta of the District of Binondo of this City, and bounded
86 on the right as you enter, by the property of Doña Tula Gorricho, on the left by the property of the heirs of Don Carlos Nalda, and at the rear with the property of Don José Grey which faces Calle (Street) San Vicente; the lot measuring on the front seventeen meters and ninety certimeters, on the right, as you enter, forty-five meters and thirty centimeters, on the left forty-five meters and thirty centimeters and at the rear sixteen meters and ninety centimeters, having a total area of seven hundred and sixty-five and fifty-seven one hundredths square meters, all of which area is occupied by the building.

(B) The present value of the property as given by the City

Assessor's office is thirty six thousand five hundred and forty-five pesos for the lot and ten thousand pesos for the building, making a total of forty-six thousand five hundred and forty-five pesos (dollars) gold. The said property is subject to a mortgage in the amount of four thousand as the capital, at six per cent. interest per annum, in favor of the Junta Administradora de Obras Pias, of Manila, a mortgage which was executed by a written instrument before the Notary Don Tomas de Velasco y Ripoll, in this city, on the tenth day of March, in the year one thousand eight hundred and eighty-one.

(C) The personal description of the other interested parties or co-owners of the property is as follows: Don José María Gabriel Olives y Gonzales, single, of legal age, property owner, and resident of this city; Doña María de los Angeles, property owner, married to Don Eduardo Gutierrez Repide, of legal age, and resident of this city; and Doña María de la Paz Olives y Gonzales, minor of twenty-three years of age, married to Don Manuel Martinez Leguna, property owner and resident of this city.

In witness of all the above statements I affix my signa-
87 ture to these presents in Manila, on the twenty-fourth day of July, nineteen hundred and three, A. D.

CONCEPCION CALVO.

Signed in the presence of:
T. STA. ROSA.
AGUSTIN ALVAREZ.

UNITED STATES OF AMERICA, *Philippine Islands, City of Manila:*

In the City of Manila, on the 24th of July, A. D. 1903, personally appeared before me Doña Concepcion Calvo y Gay, known to me as the person who executed the foregoing document, and she acknowledged to me that she executed the same as her own free act and deed, not exhibiting certificate of registration, for the reason that she is exempt on account of her sex.

In witness whereof I hereunto set my hand and affix my official seal on the day and year above mentioned.

FLORENCIO GONZALES Y DIAZ,
Notary Public.

My commission expires on the 1st of January, 1905.

88 DEF. EX. D.

Enrique Barrera Caldes,

Abogado y Notario.

Manila.

I hereby certify that on the twelfth day of August of the present year I received from Don Gabriel, Doña María de los Angeles and Doña María de la Paz Olives y Gonzalez and from Don Francisco

Ortigas as representative of Doña Concepcion Calvo y Gay, the sum of forty-three thousand five hundred and fifty two pesos and fifty cents from which to deduct certain payments which should be made on the account of the Obras Pias, the payment of the balance of the legacies bequeathed by Don José Gonzales de la Fuente, and the remainder to Doña Concepcion Calvo Gay as usufructuary of her husband Don Francisco Gonzales de la Fuente; and that there remains in my possession after making the said payments the sum of thirty-one thousand eight hundred and ten pesos and ninety-seven cents.

Manila, December 15th, 1903.

ENRIQUE BARRERA Y CALDES.

89 DEF'TS EX. I, FOR IDENTIFICATION. McD.

Enrique Barrera y Caldes,

Abogado y Notario,

Manila.

Mortgage Obligation.

In the city of Manila, Philippine Islands, on the — day of November, Nineteen Hundred and Three, before me, Enrique Barrera y Caldes, Notary Public of said City, personally appeared: Doña Concepcion Calvo y Gay, widow of Don Francisco Gonzalez de la Fuente, property owner, of legal age and resident of this City, not havin- exhibited a certificate of registration as she is *is* exempt from the payment of same by reason of her sex; Doña Maria de los Angeles Olives y Gonzales, property owner, accompanied by her husband Don Eduardo Gutierrez Repide, a lawyer,—both of age and residents of this city, the latter having exhibited his certificate of registration number one hundred and fifty-eight thousand six hundred and eighty-six, issued by the Collector of Internal Revenue of this City on the sixteenth day of June of the present year, and the former no- exhibiting a certificate of registration as by reason of her sex she is exempt from payment of same;

Doña Maria de la Paz Olives y Gonzalez, property owner, twenty-one years of age, accompanied by her husband, Don Manuel Martinez Perez y Laguna, who is a mariner by profession, and of legal age, and both residents of this City, the latter having exhibited a certificate of registration numbered one hundred and sixty-nine thousand eight hundred and thirty-four, issued by the Collector of Internal Revenue of this City on the seventeenth day of June of the present year, and the former not having exhibited a certificate of registration as she is exempt from the payment of same on account of her sex, she being accompanied also by her guardian, the above mentioned Eduardo Gutierrez Repide who was ap-

90 pointed to said position by the Honorable William J. Rohde. Judge of the Court of First Instance of the City of Manila,

by an order dictated on the twenty-first day of July, Nineteen Hundred and Two, as appears in the certificate to that effect issued by Don Marcelo Cariñgal, Deputy Clerk of said Court, on the eighth day of August last past;

And the said Don Eduardo Gutierrez y Repide and Don Manuel Martinez Perez y Laguna, whose personal circumstances are already described, in their capacities as attorneys-in-fact and legal representatives of Don Gabriel Olives y Gonzalez through the powers and authority conferred on them by means of a power of attorney duly executed and authorized in this City, before the Notary Public, Don Fernando de la Cantera, on the twenty-sixth day of September of the present year.

And having as I consider legal capacity to execute contracts and bind themselves, the parties hereto in their respective capacities, and Doña Maria de los Angeles and Doña Maria de la Paz Olives y Gonzalez having previously obtained the proper permission from their respective husbands, hereby

Declare.

First. That Don Francisco Gonzalez de la Fuenta died in this City, leaving a will executed on the third day of June, Nineteen hundred and two, which was admitted to probate by the Court of First Instance of Manila on the seventeenth of the following September.

Second. That by virtue of the provisions of said will Doña Concepcion Calvo y Gay is the usufructuary of the estate left by her deceased husband, Sr. Gonzalez de la Fuente, the titles of ownership to said properties belonging to Don Gabriel, Doña Maria de los Angeles and Doña Maria de la Paz Olives y Gonzalez.

91 Third. The City property situated at numbers 71 to 75 of Calle (Street) Escolta, District of Binondo of this City, having been sold, and a half of which property belonged to Don Francisco Gonzalez de la Fuente, from whom it is inherited, and there having been deducted from the amount of the proceeds of the sale of said one half certain debts which were pending payment, there remained a balance of thirty thousand two hundred and sixty-six pesos and ninety-seven cents.

Fourth. That previous to this date the deponents agreed that the usufructuary, Doña Concepcion Calvo y Gay, could dispose of the above mentioned sum in any manner she deemed fit after executing in favor of the other deponents sufficient guaranty to secure the return of said sum by her heirs.

Fifth. That the deponent Doña Concepcion Calvo y Gay is the full and absolute owner and in possession of the following described parcels of real estate:

(A) A City property consisting of a house of masonry construction with iron roof, and the lot upon which it stands designated as number five and fronting on Plaza Palacio, Intramuros, of this City. It is bounded on the right as you enter by the house and lot number six which formerly belonged to Don Gonzalo Marzano, and

at the pr-sent time to Don Gonzalo Tuason; on the left by lot number two belonging to Doña Carmen Barredo y Gonzalez, and on the rear by the house and lot number three which faces Calle Audiencia and belongs to Don Francisco Enriquez. The lot, which is entirely covered by the building measures seventeen meters and sixty centimeters on the front, twenty-eight meters and five centimeters on both the right and left sides, and seventeen meters and forty-five centimeters on the rear, with a total area of four hudnred and
92 ninety-one square meters and one hundred and thirty-five square decimeters. The interest which the deponent Doña Concepcion Calvo y Gay has in and to the said described property is noted on pages thirteen and twenty-four, and reverse of the latter, of provisional book number one of the Archives of the Registry for the South District, of the Walled City, property number, one hundred; an-otations, under letters A and B.

(B) City property consisting of a house and lot, designated as number seven of Calle Solana, Intramuros, of this City. It is bounded on the right as you enter, by the house and lot of Doña Cayetana Prado, on the left by the lot belonging to the estate of Don Pedro Ocampo, and on the rear by the house and lot belonging to Doña Antonia Salgado, widow of Pujades. The lot has a total area of six hundred and twenty-two and sixty-six one hundredths square meters. This property was acquired by the deponent, Doña Concepcion Calvo y Gay during her married life with her husband Don Francisco Gonzalez de la Fuente, by virtue of an instrument numbered seven hundred and fifty-one, executed in this City before the Notary Public, Don Henaro Heredia, on the seventh of June of the year one thousand nine hundred and one, and which was registered in favor of the said Sr. Gonzales de la Fuente, as legal representative and administrator of the conjugal partnership constituted with his wife, the deponent, on page fifty-seven of the first volume of the Registry for the South District, second book of the Intramuros division, property number, forty-one duplicated, inscription number four; the deponent Doña Concepcion Calvo y Gay having ac-
quired title to the entire describe- property by virtue of the
93 legacy made in her favor by her said husband in *in* the third paragraph of the will executed by him on the third day of June of the year nineteen hundred and two, and which was admitted to probate by the Court of First Instance of Manila, Part I, on the seventeenth of September of the said year nineteen hundred and two.

Sixth. The *the* deponent with the object of carrying properly in effect the said agreement, hereby

Stipulate.

First. That Doña Concepcion Calvo y Gay upon the execution of this obligation receives the sum of thirty thousand two hundred and sixty-six pesos and ninety-seven cents, which sum shall be returned to Don Gabriel, Doña Maria de los Angeles and Doña Maria de la Paz, all surnamed Olives y Gonzalez, by the heirs of the said

Doña Concepcion Calvo y Gay upon the termination of the said usufruct.

Second. That as security for the said obligation a special mortgage is constituted in favor of the said Don Gabriel, Doña Maria de los Angeles and Doña Maria de la Paz Olives y Gonzalez, upon the said described parcels of real estate situated on Plaza Palacio and Calle Solana, described respectively in paragraphs "A" and "B" of the fifth section of this instrument; the property described under letter "A" to be security for the sum of ten thousand two hundred and sixty-six pesos and ninety-seven cents, and the property described under letter "B" as security for the sum of twenty thousand pesos; in which sums the said properties are valued and which sums shall serve as a basis for the auction, which in proper case may be had, whether such be had according to the provisions of
94 the Mortgage Law and procedure, or according to the proceedings established by the Code of Civil Procedure now in force, and expressly renouncing any other valuation arising from action instituted to that end.

Third. As further security the deponent, Doña Concepcion Calvo y Gay, upon the execution of this instrument shall deliver to Doña Maria de los Angeles, Doña Maria de la Paz Olives y Gonzales and to Don Eduardo Gutierrez y Repide and Don Manuel Perez y Laguna, as attorneys-in-fact of Don Gabriel Olives y Gonzales, an insurance policy upon the life of said Doña Concepcion Calvo y Gay, issued on the fifteenth of September of the present year by the Company known as "The Sun Life Assurance Company of Canada," for the sum of thirteen thousand five hundred dollars, United States Currency; which policy cannot be paid without the intervention of the said Don Gabriel, Doña Maria de los Angeles and Doña Maria de la Paz Olives y Gonzalez, in favor of whom a preferential right is constituted.

Fourth. Doña Maria de los Angeles and Doña Maria de la Paz Olives y Gonzales, having obtained the proper consent of their respective husbands Don Eduardo Gutierrez y Repide and Don Manuel Martinez Perez y Laguna, and the latter in their capacity as attorneys-in-fact and legal representatives of Don Gabriel Olives y Gonzales, accept the obligation contracted by Doña Concepcion Calvo y Gay, as well as the guarantees constituted by her to secure the compliance of the said obligation.

And Fifth. The deponents, by mutual agreement designate the City of Manila for all judicial oe extrajudicial acts which may originate from this instrument.

In witness whereof, the parties hereto above named, known
95 to me, and to me known as the parties named, acknowledge under oath that they executed this instrument as their own free act and deed, and they ratify the same in the presence of the witnesses Don Candido del Rosario y Espiritu and Don Manuel Sansano y Arciaga, clerks, of age and residents of this City, with whom they sign the present instrument, to which I, the undersigned Notary, set my signature and affix my official seal the day, month and year above mentioned, to all of which I certify.

96 2342.

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court.

CONCEPCION CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

Messrs. Coudert Brothers, Manila:

You are hereby notified that on Monday the 9th of January, 1905, the accompanying motion asking that the execution of the sentence in the above mentioned cause be suspended, will be presented to the Supreme Court for hearing.

Manila, December 29th, 1904.

HARTIGAN, MARPLE, SOLIGNAC & GUTIERREZ,
Attorneys for the Defendants and Appellants.

Received copy.

COUDERT BROTHERS,
Attorneys for the Plaintiff.

12/29/04.

Filed in the Clerk's Office of the Supreme Court of the Philippine Islands this 29 day of December, 1904, 11 a. m. J. E. Blanco, Clerk, By H. D. McGeorge, Deputy.

97 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court.

CONCEPCION CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ and Her Husband EDUARDO GUTIERREZ; GABRIEL OLIVES, PAZ O. DE MARTINEZ, and Her Husband MANUEL MARTINEZ, Defendants and Appellants.

Motion.

Now come the defendants and appellants and respectfully ask the Honorable Supreme Court to order the suspension of the execution of the sentence rendered in this matter in the Court of First Instance, and that the appeal from said sentence be allowed without any obligation on the part of the appellants of furnishing any bond whatever.

This motion is based on the Bill of Exceptions presented in this matter.

Manila, December 29th, 1904.

HARTIGAN, MARPLE, SOLIGNAC & GUTIERREZ,
Attorneys for the Defendants and Appellants.

98 THE UNITED STATES OF AMERICA.

Supreme Court of the Philippine Islands.

February 10th, 1905.

General Registry No. 2342.

Judgment Record f. ——.

CONCEPCION CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

Decision of Motion.

The appellants in this case have presented a motion asking that the execution of the judgment of the Court of First Instance be suspended pending the hearing of the appeal.

It appears that the Court of First Instance decided that the execution of the judgment should not be suspended unless the appellants furnished a bond conditioned to satisfy the final judgment which might be rendered in said cause, relying upon Sect. 144 of the Code of Civil Procedure, which leaves to the discretion of the trial Court whether the execution of the judgment shall be suspended or not.

This Court will not intervene to modify, regulate or inquire into the exercise of these discretionary powers which the law confers upon judges of cours*t* of forst instance, unless it be alleged and proven that abuses have been committed or that the judge upon whom is conferred the power to order such suspension has exceeded his authority, or that since the order was issued the circumstances of the case have so changed that the intervention of the Court of Appeals is necessary to protect the interests of the parties from
99 contingencies which the Judge of first instance could not foresee. (Gerome *vs.* McCarter, 21 Wallace, U. S.) In the case under discussion no such reasons have been alleged, the motion therefore is denied, with costs to the plaintiff.

A. C. CARSON.

We concur,

(S'g'd) C. S. ARELLANO.
" FLORENTINO TORRES.
" E. FINLEY JOHNSON.
" VICTORINO MAPA.

100 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

R. G. No. 2342.

MANILA, P. I., *February 10th*, 1905.

CONCEPCION CALVO
vs.
ANGELES O. DE GUTIERREZ.

Mr. —— ——.

SIR: You are hereby notified that on this date a decision in the above entitled cause has been filed overruling the motion, with costs to the plaintiff.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

A copy.
(S'g'd) HARTIGAN &C. AND
COUDERT BROS.

(S'g'd) H. D. McGEORGE,
By —— ——, *Deputy.*

101 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

No. 2342.

DA. CONCEPCION CALVO, Plaintiff and Appellee,
vs.
DA. ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

Mr. Cohn.

The Clerk of the Supreme Court.

SIR: Please to include the above entitled cause in the calendar of cases that are to be heard during the next sessions of the Court, to be held in the month of July.

Manila, June 26th, 1905.

HARTIGAN, M. R. & G., Two.
Attorneys for the Defendants and Appellants.

Received copy of this notice on this 26th of June, 1905.

COUDERT BROTHERS,
Attorneys for the Plaintiff and Appellee.

Filed in the Clerk's Office of the Supreme Court of the Philippine Islands this 29 day of June 1905. 10:00 a.m.

J. E. BLANCO, *Clerk*,
By H. D. McGEORGE, *Deputy*.

102 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

Extract of the Minutes of the Session Held on This 3rd Day of August, 1905.

Cause No. 2342—Calvo *versus* Gutierrez, *in re* a sum of money, and no one appearing in representation of either party the case was considered as submitted to the Court who resolved to decide it in due course.

J. E. BLANCO,
Clerk, Supreme Court, P. I.,
By H. D. McGEORGE, *Deputy*.

Messrs. Chief Justice C. S. Arellano, Associate Justices Torres, Mapa, Johnson, Carson, Willard.

103 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

Extract from the Minutes of the Session Held on This 15th Day of August, 1905.

In view of the petition presented by Attorney Cohn the Court was pleased to fix the 31st of the present month as a date for the hearing of cause No. 2342—Calvo *versus* Gutierrez, the hearing already held to be of no effect.

J. E. BLANCO,
Clerk, Supreme Court, P. I.,
By H. D. McGEORGE, *Deputy*.

Messrs. Chief Justice C. S. Arellano, Associate Justices Torres, Mapa, Johnson, Carson, Willard.

JJ.
A copy,
C. C. COHN
HARTIGAN & CO.

104 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

Extract of the Minutes of the Session Held on This 31st Day of August, 1905.

Cause No. 2342,—Concepcion Calvo *versus* Angeles O. de Gutierrez, *et al., in re* a sum of money, having been called for hearing Mr. Rohde appeared in behalf of the appellants and Mr. Cohn on the part of the appellee, and after hearing the argument of Mr. Rohde and in view of the late hour of the day the Court decided to continue the hearing until the following day at nine o'clock a. m.

J. E. BLANCO,
Clerk, Supreme Court, P. I.,
By H. D. McGEORGE, *Deputy.*

Chief Justice C. S. Arellano.
Associate Justices Torres, Mapa, Johnson, Carson and Willard.

105 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

Extract from the Minutes of the Session Held on This 1st Day od September, 1905.

The Court being in public session the hearing in the matter of Cause No. 2342—Concepcion Calvo *versus* Angeles O. de Gutiérrez, *et al. in re* a sum of money, was called, it having been continued from a previous date, and Messrs. Rohde and Cohn appeared in behalf of the respective parties, and having heard the arguments of Mr. Cohn and the statements of Mr. Rohde, said cause was taken under advisement by the Court to be decided in due course.

J. E. BLANCO,
Clerk, Supreme Court, P. I.,
By H. D. McGEORGE, *Deputy.*

106 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 2342.

Sobre Cantidad de Pesos.

April 11, 1906.

CONCEPCION CALVO, Plaintiff and Appellee,
against
ANGELES OLIVES y su esposo EDUARDO GUTIERREZ, y PAZ OLIVES DE MARTINEZ y su esposo MANUEL MARTINEZ y GABRIEL OLIVES, Defendants and Appellants.

Decision.

CARSON, *J.:*

Francisco Gonzalez de la Fuente, the deceased husband of the plaintiff in this case, was the owner at the time of his death of an undivided half interest in the following property, namely: a house on Calle Palacio, Manila; a building known as number 96 Escolta, Manila; an hacienda situated in Pasacao, Province of Mamarines, and certain furniture and jewelry, the other undivided half interest in said property being the property of the defendants Angeles, Paz and Gabriel Olives, all of said property being burdened with certain debts and legacies amounting to $11,741.53 Mexican Currency. The title to two houses in Ermita, Manila, was also registered in the name of the said de la Fuente at the time of his death, this letter property being burdened with a debt of $12,000.00 Mexican Currency, in favor of one Julian de la O.

Under the term of the will of the said de la Fuente, all of his property was given to the defendants Angeles, Paz and Gabriel Olives, subject, nevertheless, to a life interest in the usufruct
107 thereof in favor of his widow Concepción Calvo, the plaintiff in this case.

In the settlement of the estate differences arose between the plaintiff and the defendants, and with a view to the adjustment of these differences the following agreement was entered into:—

"The undersigned, Angeles and Paz Olives, in the presence of their respective husbands, and Gabriel Olives, as heirs of certain property of Francisco Gonzalez de la Fuente, and Concepcion Calvo, as usufructuary heiress of the said Gonzalez, agree upon a division of the inheritance, the principal conditions of which are as follows:—

"First: The property No. — on the Escolta, half of which belonged to the testator, shall be sold at a price not less than Ninety Thousand Dollars.

"Second: From the proceeds of the sale there shall be paid to

the pious works, the amount owing Mr. Roensch, that owing Julian La O. and the unpaid legacies made by Jose Gonzalez de la Fuente.

"Third: The remainder shall be turned over to Doña Concepcion Calvo to be used by her as usufructuary heiress after she has given a mortgage bond (fianza hipotecaria).

"Fourth: Concepción Calvo relinquishes her right to reimbursement of the amounts expended by her on account of the last illness and the burial of the testator. But in compensation for this she shall have all the movable property of the testator with the exception of a set of buttons, etc., etc., belonging to the testator's father, which shall go to Gabriel Olives as the only male grandson.

"Fifth: With regard to the pieces of property purchased by the testator from Pantaleona Rivera, which were paid for by money half of which belonged to the testator and the other half to the heirs of Paz Gonzalez, Concepción Calvo recognized the said heirs as absolute owners of the half of the interest of the testator in and to the said property.

"Sixth: Angeles, Paz and Gabriel Olives respect the legacy of the testator to Concepción Calvo, and acknowledge her right to enjoy the usufruct of half of the house No. 97 Calle Palacio, half the estate of Pasacao, and half the interest of the Ermita houses.

"Seventh: Gabriel, Angeles and Paz Olives renounce all rights they may have as wards of the testator to require a rendering of accounts of any kind.

"Eighth: Concepción shall be entitled to claim from Pantaleona Rivera whatever taxes she may have paid for the Ermita houses after the death of the testator.

108 "In witness whereof, we sign the present document in Manila, this fourth day of May, 1903.

"(Signed) CONCEPCION CALVO.
ANGELES O. DE GUTIERREZ.
EDUARDO GUTIERREZ.
GABRIEL OLIVES.
PAZ O. DE MARTINEZ. AND
MANUEL MARTINEZ."

The building on the Escolta was sold for the sum of $90,000.00, Mexican Currency, and a short time thereafter the property in Ermita was resold to its original owner for the sum of $15,000.00, Mexican Currency. Out of the money realized from the Escolta property $11,741.53 was paid on account of the above mentioned debts and legacies, and out of the proceeds of the sale of the houses in Ermita the above mentioned debt of 12,000.00 was paid to the said Julian de la O.

The defendants negotiated the resale of the Ermita property and the payment of the $12,000.00 debt thereon, and retained the entire balance of $3,000.00 arising out of the transaction, and further received from the proceeds of the sale of the Escolta property the sum of $45,892.00, the balance of the proceeds of the sale of the Escolta property after the payment of the above mentioned debt, amounting to $32,365.97, was left in the hands of one Barrero to be paid

over to the plaintiff upon the execution of a proper mortgage bond to secure its return to the defendants at her death, which balance is now in the hands of Mr. C. C. Cohn, attorney, he having been appointed by the court of First Instance as receiver to hold the said funds subject to the orders of the Court.

Plaintiff refuses to accept the said balance, and insists that under the terms of the foregoing agreement she is entitled to have one-half of the amount received for the San Luis property and the whole amount of the purchase price of the property on the Escolta,
109 less the amount of the debts mentioned in the second article of the agreement.

The Court below was of opinion that the language of the third section of the foregoing agreement leaves no room for interpretation or construction, and that the word "remainder" as used therein refers necessarily to the balance remaining after deducting from the whole amount received from the Escolta property the amount of the debts and legacies mentioned in the second section. We are of opinion, however, that the Court erred in its construction of this section of the agreement, and we think that the word "remainder" must be limited to the inheritance which it was the intention and object of the parties devide, for the preamble expressly states that the parties, as heirs of Francisco Gonzalez de la Fuente, agree upon a division of the inheritance, and it is admitted that one-half of the property on the Escolta was the property of the defendants, and formed no part whatever of said inheritance.

Article 1283 of the Civil Code provides that "However general may be the terms of a contract, there shall not be understood as included therein other subjects or things and cases different from those regarding which the interested parties proposed to contract;" and we are of opinion that although the word "remainder," as used in the third section of the said agreement, might, in the broadest acceptation of the term, refer to the total balance resulting from the sale of the Escolta property, nevertheless, under the provisions of the foregoing article it should be limited to the subject matter of the agreement, and thus limited, it must be taken to refer to the remainder of the share of the inheritance in which Doña Concepción Calvo had a usufructuary life interest.

110 That this is the correct interpretation of the language used is confirmed by the fact that the article itself expressly provides that the "remainder" to be turned over to Doña Concepción Calvo was to be used by her "as usufructuary heiress," and it is not contended that she had an interest as usufructuary heiress in more than an undivided one-half interest in this particular property.

Under the provisions of article 1282 of the Civil Code, in determining the intention of the parties to an agreement, it is proper to give special consideration to the circumstances surrounding its execution, and we are further confirmed in our interpretation of the language of the article in question by the conduct of the parties to the contract as it appears of record, and by a review of the circumstances under which the agreement was executed.

It is unnecessary to review in detail the evidence touching the

conduct of plaintiff throughout the negotiations, and it is sufficient to say that we think that it strongly tends to prove that she never expected to receive more than one-half of the net proceeds of the sale of the Escolta property until after the agreement had been duly executed, when an apparent ambiguity in the language of one of its provisions seems to have suggested the construction of its terms which she is now endeavoring to enforce.

The plaintiff's contention that the defendants agreed to give her a usufructuary life interest in their half of the Escolta property in consideration of certain concessions made by her is not borne out by the record, and an examination of the alleged concessions discloses that so far as concessions were made, they came largely if not wholly from the defendants.

111 Plaintiff claimed that she was entitled to reimbursement for the amount expended by her on account of the last illness and the burial of the testator, and this claim was recognized and adjusted in the fourth section of the agreement.

Plaintiff set up a claim for moneys which she alleges were due the estate of de la Fuente on account of advances made by him to the defendants during the extended period in which he had been acting as their guardian, but we are satisfied, from an examination of the record, that this claim was not a genuine one and was not well found; whereas the defendants, who had demanded a settlement of guardianship accounts, claiming that the estate of de la Fuente was due them some $50,000.00, might have recovered a substantial part of this sum if it could not be made to appear that all of the income of their estate had been properly expended in their education, maintenance and support.

Plaintiff further claimed that prior to the death of de la Fuente the defendants had no right, title or interest in or to the Ermita property, said property having been purchased by him and duly recorded in his own name, but it appears that the money with which de la Fuente purchased the Ermita property was derived from the sale of property in which he and the defendants were joined and equal owners, and therefore it would appear that even though it be admitted that defendants could not establish an equitable title to a one-half interest in the Ermita property, it is clear that the estate of

112 the guardian would be required, in any event, to account for a sum equal to the amount of the share of the fun-s used in its property which belonged to the defendants.

It appears that of the funds invested in the Ermita property $7,500.00 came into the hands of de la Fuente in his capacity as guardian of the defendants, but under the terms of the agreement they received only an interest in said property worth $1,500.00, they having conceded the payment out of the joint property of de la Fuente and themselves of the debt of $12,000.00 with which this property was burdened. We think, therefore, that any concession made in the matter of the Ermita property was in fact made by the defendants and not by the plaintiff.

The only other concession claimed to have been made by the plaintiff was the giving of her consent to the sale of the Escolta

property and the payment of certain debts mentioned in the second section of the agreement. And while it may be admitted that in agreeing to join in the sale of this property there was a concession to the wishes and desires of the defendants, yet it is inconceivable that they should agree, or the plaintiff in good faith propose, that in consideration of her agreement to sell so valuable a piece of property in but one-half of which she held merely a usufructuary interest, the owners of the other half were to grant her a usufructuary life interest in the total net proceeds of the sale. Furthermore, it appears that the sale was an extremely advantageous one, and that the plaintiff should have been equally interested with the defendants in the final and amicable settlement of the questions arising out of the distribution of the inheritance and the payment of the debts of the testator.

113 We are satisfied from an examination of all the circumstances surrounding the execution of the contract that there were no concessions on the part of the plaintiff which by any possibility could be considered as a reasonable consideration to support a grant of a usufructuary life interest in the defendants' share of the proceeds of the sale of the Escolta property, and that such concessions as she may have made were fully compensated in the agreement by the waiver of the defendants' claim for a liquidation and settlement of the testator's guardianship accounts, and their agreement to have the said debt of Julian de la O. made a debt against the joint property of the defendants and de la Fuente.

The defendants, on their part, contend that under the provisions of the second section of the said agreement all the debts mentioned therein should be paid exclusively out of the share of the proceeds of the sale of which, under the will, the plaintiff had a usufructuary interest for life. But the language of the section is express and explicit, and we think that it was manifestly the intention and agreement of the parties that all of these debts and legacies should be paid out of the total proceeds of the sale before division was made, and it is to be noted that the above mentioned provision of the Code is not applicable to the second section because so far as it appears from the record, all the debts and legacies mentioned therein were a charge against the property in which de la Fuente and the defendants had a joint interest, and the payment of the debts with which the property was charged was plainly contemplated as a preliminary step to the division of the inheritance.

114 Ninety thousand pesos were realized from the sale of the Escolta property, and $15,000.00 from the sale of the Ermita property. From the funds thus realized payment was made of the debts and legacies mentioned in the second section of the agreement amounting to $22,741.53. The balance amounting to $81,258.47 should have been divided equally between the plaintiff and the defendants, the plaintiff receiving $40,629.23 to be employed during her life as usufructuary heiress upon the execution of a proper mortgage bond as required by the terms of the agreement. The defendants in fact received $45,892.50 from the net proceeds of the sale of the Escolta property, and $3,000.00 from the net proceeds of the sale

of the Ermita property, or $8,263.27 more than they were entitled to under the terms of the agreement, and the funds left in Barrero's hands, and now in the hands of C. C. Cohn, receiver, as appears by the judgment of the trial court, amount to $32,365.97, being $8,263.27 less than the amount to which the plaintiff is entitled as usufructuary heiress.

No assignment of error was made as to that portion of the judgment of the trial Court which deals with the property on Calle Palacio and the Hacienda at Pasacao, and therefore the questions involved therein are not before *before* us for review.

The judgment of the trial court is reversed without costs to either party, and it appearing that execution was not suspended pending the appeal, and it not appearing from the record whether the order of the court directing the defendants to pay into the court the amount of said judgment has or has not been complied with, the cause is remanded to the trial court where judgment will be entered in acordance with the foregoing principles, and the proper orders entered to give effect to the same.

It is so ordered.

115 (Signed) A. C. CARSON.

Concurring:

(Signed) C. S. ARELLANO.
" FLORENTINO TORRES.
" VICTORIANO MAPA.
" E. FINDLEY JOHNSON.
" CHARLES A. WILLARD.

116 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

R. G. No. 2342.

MANILA, P. I., *April 11th*, 1906.

CONCEPCION CALVO
vs.
ANGELES O. DE GUTIERREZ ET AL.

In re Sum of Money.

Mr. —— ——.

SIR: You are hereby notified that on this date the decision handed down in this cause has been filed, which decision revokes the judgment appealed from and declares that the defendants received in fact $45,892.50 from the net proceeds of the sale of the properties on the Escolta, and $3,000.00 from the net proceeds of the sale of the properties in Ermita, which is $8,263.27 more than what they were entitled to according to the agreement, and that the amount deposited in the hands of Mr. Barrera and which is now in the hands of Mr. C. C. Cohn, as trustee according to the judgment appealed

from, is the sum of $32,365.97, which is $8,263.27 less than what the plaintiff is entitled to receive as usufructuary heiress; no particular finding being made in regard to the costs; and it appearing that the execution of the sentence was not suspended pending the appeal, and as it does not appear from the records whether the order issued by the Court requiring the defendants to pay into Court the amount mentioned in said judgment has been complied with, the records will be returned after twenty days to the trial Court in order that the Judge may render judgment according to this decision, and issue the proper orders for its execution.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands,
By —— ——, *Deputy.*

Copy,

COUDERT BROS. AND HARTIGAN &
(S'g'd) H. D. McGEORGE.

117 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

CONCEPCION CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

In re a Sum of Money.

Now come the defendants in the above entitled cause and state:

I.

That in this case they presented in their brief among other things the request that the Supreme Court revoke the judgment rendered by the lower Court, and order that the appointment of the trustee made in this matter be annulled, and that the money in the hands of said trustee be delivered to the defendants to remain with them until the plaintiff should furnish the proper mortgage bond in favor of the defendants.

II.

That in the decision handed down by the Supreme Court in this cause the judgment rendered in the Court of First Instance is reversed but nothing is said about the termination of the trusteeship and the delivery to the defendants of the amount which is in the hands of the trustee to remain with them until the plaintiff furnish the proper bond.

And as the fact that the Supreme Court in its decision mentions nothing in regard to this point might create doubts, and dif-
118 ficulties might arise upon carrying the same into effect we respectfully request that this Honorable Court make a sup-lementary finding to its decision already handed down stating whether the appointment of the trustee has been annulled (which

trustee is acting as such at the present time without having furnished any bond whatsoever), and if in consequence of such decision, and according to the provisions of the third paragraph of Sect. 494 of the Civil Code, the sum which is in the hands of the trustee should be delivered to the defendants until such time as the plaintiff furnishes the proper mortgage bond.

And as in this petition no claim is made which could in any way prejudice the plaintiff, in fact all that is asked is that the decision be made clearer, which is something of interest to all parties concerned, we submit that it is proper for this Honorable Court to decide it without hearing the respective parties, but in case it be thought necessary to hear them, we request, in view of the fact that the vacation period will commence before the termination of the ten days as allowed by the Rules of the Court, that the Court order the hearing of this petition before the end of the present week.

We respectfully pray the Supreme Court to grant the preceding petition as a matter of justice.

Manila, April 21st, 1906.

(S'g'd) HARTIGAN, ROHDE & GUTIERREZ,
Attorneys for Defendants.

Received copy,

COUDERT BROTHERS,
Attorneys for Plaintiff.

April 23–06.

119 APRIL 26TH, 1906.

SIR: The Supreme Court in session on this date handed down the following:—

"After considering the petition presented by Messrs. Hartigan, Rohde & Gutierrez, asking for an explanation of the decision of the Court in the matter of Concepcion Calvo *versus* Angeles O. Gutierrez, the Court stated: as the dispositions of that decision are to the effect that the Judge render the proper judgment in accordance with the findings of the decision of this Court, which findings clearly determine the rights of the respective parties according to the agreement, the Judge upon rendering his sentence to make the corresponding findings and issue immediatel/ the proper orders, and the motion requesting supplementary findings to the above mentioned decision is therefore overruled."

Which is communicated to you for your information.

(S'g'd) J. E. BLANCO,
Clerk, Supreme Court, P. I.

A copy.

HARTIGAN &C. AND COUDERT &C.

120 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

Decision Book 5 F.

General Register No. 2342.

CONCEPCION CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

MAY 9TH, 1906.

This Court having acquired the necessary jurisdiction to hear the above entitle- cause which was submitted by both parties, for its resolution, and after having considered it and examined the records and decree and order of the Court were filed on the 11th day of April, 1906, for the issuing of the sentence:

And by virtue of said order the judgment of the Court of First Instance of Manila of the 15th of November, 1904, appealed from is hereby reversed, and it is declared that the defendants received in effect $45,892.50 of the net proceeds from the sale of the property on the Escolta and $3,000.00 of the net proceeds from the sale of the properties at Ermita, which is $8,263.27 more than what they are entitled to according to the agreement, and the amount deposited in the hands of Sr. Barrera and which is now in the possession of Sr. C. C. Cohn, as receiver, as appears from the sentence appealed from, is the sum of $32,365.27, or $8,263.27 less than what the plaintiff is entitled to receive as usufructuary heiress; no special findings being made as to the costs; it appearing that the execution of the sentence was not suspended pending the appeal, and it not appearing
121 from the records whether the order of the Judge requiring the defendants to pay into Court the amount stated in said judgment has been complied with.

It is further ordered, that —— —— recover from —— —— the sum of —, as costs of the case.

(S'g'd) H. D. McGEORGE,
Deputy Clerk of the Supreme Court of the Philippine Islands.

122 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court of the Philippine Islands.

No. 2333.

CONCEPCIÓN CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

Petition for Allowance of Appeal.

Concepción Calvo, the above named plaintiff and appellee, conceiving herself aggrieved by the decision, order and decree entered

by this Honorable Court in the above entitled cause on the 9th day of May, 1906, wherein and whereby it was ordered, adjudged and decreed that, after the expiration of ten days from the entering of said judgment, said cause be remanded to the Court of First Instance of the City of Manila for revocation of the judgment entered therein and for judgment and execution thereof in conformity with the orders and decrees of this Honorable Court in its aforesaid decision, and does hereby appeal to the Supreme Court of the United States from said decision, order and decree of this Honorable Court for the reasons set forth in the assignment of errors which is filed herewith, and she prays that this her petition for her said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decision, order and decree were made, duly
123 authenticated, may be transmitted to the Supreme Court of the United States.

And the petitioner will ever pray,

(S'g'd) COUDERT BROTHERS,
JOHN W. HAUSSERMANN,
CHARLES C. COHN,
D. R. WILLIAMS,
H. W. VAN DYKE,
Attorneys for Plaintiff & Appellant.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 9 day of May, 1906, 1 p. m.

(S'g'd) J. E. BLANCO, *Clerk*,
By H. D. McGEORGE, *Deputy*.

124 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court of the Philippine Islands.

No. 2333.

CONCEPCIÓN CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

Assignment of Errors.

Plaintiff and appellee presents and files the following assignment of errors upon which she will rely upon her appeal from the decision of this Honorable Court entered in the above entitled cause on the 9th day of May, 1906.

First. The contract in this cause which defines the respective rights of the parties, being in plain and unambiguous language, the Court erred in giving to the same a judicial construction at variance with the ordinary significance of that language.

Second. The contract in this cause, being an amicable compromise between plaintiff and defendants concerning the partition of an estate in which the former concedes to the latter all claims made by them,

the Court erred in holding that the consideration for such concessions must be limited to the subject matter of the estate.

Third. The Court erred in interpreting a plain and unambiguous contract between the parties according to the conduct of the
125 parties and the circumstances under which the agreement was executed.

Fourth. The Court erred in adjudging that the conduct of the parties and the circumstances under which the agreement was executed do not substantiate the contention that the defendants agreed to give plaintiff an usufructuary life interest in their half of the Escolta property referred to in the contract.

Fifth. The Court erred in adjudging that the defendants had any right, title or interest in or to the Ermita property referred to in the contract, prior to its execution.

Sixth. The Court erred in decreeing that the plaintiff is entitled to receive P40,629.23 instead of P79,768.47, Philippines Currency.

Wherefore appellee prays that said judgment may be reversed and that appellee may have judgment in her favor as herein specified.

(S'g'd) COUDERT BROTHERS,
JOHN W. HAUSSERMANN,
CHARLES C. COHN,
D. R. WILLIAMS,
H. W. VAN DYKE,
Attorneys for Plaintiff & Appellant.

May 9th, 1906.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 9 day of May, 1906, 1 p. m.

J. E. BLANCO, *Clerk*,
By H. D. McGEORGE, *Deputy*.

126 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court of the Philippine Islands.

CONCEPCIÓN CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

Order Allowing Appeal.

On motion of Charles C. Cohn, Esquire, of Counsel for plaintiff and appellee, and after consideration of the petition filed herein on the 9th day of May, 1906, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore entered herein on the 9th day of May, 1906, be, and the same is hereby allowed, without supersedeas, and that a certified transcript of the record, testimony, exhibits, stipulations, opinions, and all proceedings herein be forthwith transmitted to said Supreme Court of the United States.

And it is further ordered that a bond on appeal be fixed at the sum of Five Hundred Dollars ($500.00), U. S. Currency, for costs on appeal.

(S'g'd) CHARLES A. WILLARD,
Associate Justice of the Supreme Court of the Philippine Islands.

Manila, May 10th, 1906.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 10 day of May, 1906, 9.30 a. m.

J. B. BLANCO, *Clerk,*
By H. D. McGEORGE, *Deputy.*

127 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court of the Philippine Islands.

CONCEPCIÓN CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

Bond on Appeal.

Know all men by these presents, That I, Concepción Calvo, as principal, and Miguel Velasco and José Ma. Dosado, as sureties, are held and firmly bound unto the Government of the Philippine Islands in the full and just sum of Five Hundred Dollars ($500.00), U. S. Currency, for the payment whereof, to the Government of the Philippine Islands, we bound ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this second day of May, in the year of our Lord one thousand nine hundred and six.

Whereas, at session of the Supreme Court of the Philippine Islands, in a cause pending in said Court wherein Concepción Calvo was plaintiff and appellee and Angeles O. de Gutierrez, *et al.*, were defendants and appellants, an order and decree was entered in favor of Angeles O. de Gutierrez *et al.*, the said Concepción Calvo having obtained from said Court an order allowing an appeal to the Supreme Court of the United States to reverse the order and decree

128 in said cause.

Now, the condition of the above obligation is such that if the said Concepción Calvo shall prosecute the said appeal to effect, and shall answer all costs that may be assessed against her if she fail to make her plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

(S'g'd) CONCEPCION CALVO.
" JOSÉ MA. ROSADO.
" MIGUEL VELASCO.

UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

Miguel Velasco and José Ma. Rosado, sureties on the within obligation, being duly sworn, deposes and say each for himself, that he is a resident and property owner in the City of Manila, and that he is worth more than the amount expressed in the said obligation as a penal sum, over and above all his debts, judgments and obligations exclusive of property exempt from taxation.

(S'g'd) MIGUEL VELASCO.
" JOSÉ MA. ROSADO.

Subscribed and sworn to before me this 7th day of May, 1906, exhibiting respectively cedulas Nos. 1395484 of Feb'y 16,
129 1906, and 1324712 of Jan'y 11, 1906.

The above bond approved this 10 day of May, 1906.

(S'g'd) CHARLES A. WILLARD,
Associate Justice of the Supreme Court of the Philippine Islands.

Filed May 10/06.

130 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Angeles O. de Gutierrez and Eduardo Gutierrez, her husband, Gabriel Olives, Paz O. de Martinez, and Manuel Martinez, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within ninety days from the date of this writ, pursuant to an appeal, duly allowed by the Supreme Court of the Philippine Islands and filed in the Clerk's office of said Court on the 10th day of May, A. D. 1906; in a cause wherein Concepción Calvo is appellant and you appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 10th day of May, in the year of our Lord, nineteen hundred and six.

CHARLES A. WILLARD,
Associate Justice of the Supreme Court of the Philippine Islands.

We admit the receipt of a copy of the above citation and accept service thereof this 10th day of May, 1906.

HARTIGAN, ROHDE & GUTIERREZ,
Attorneys for Appellees.

131 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

I, J. E. Blanco, Clerk of the above entitled Court, hereby certify that I have examined the annexed document, to wit: copies of the decrees and sentence rendered in case No. 2342 of this General Registry, prosecuted in the Court of First Instance of Manila by Concepcion Calvo against Angeles O. de Gutierrez, *et al., in re* a sum of money, * * * and have compared it with its original which is on file in this office, and of which it is a true and correct copy.

And that such may appear I have signed the present certificate, and have affixed to it the official seal of this Court on this thirty-first day of May of the year one thousand nine hundred and six.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands,
(Sgd.) By H. D. McGEORGE, *Deputy.*

132 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

R. G. No. 2342.

CONCEPCION CALVO, Plaintiff and Appellee,
vs.
ANGELES O. DE GUTIERREZ ET AL., Defendants and Appellants.

Letter Forwarding Papers.

To the Judge of First Instance of the City of Manila, Greeting:

In accordance with the provisions of the laws which govern in the case I hereby forward to you certified copies of the decision and sentence rendered by the Supreme Court of the Philippine Islands in the above entitled cause.

In witness whereof is hereby set my signature, and affixed the official seal of this Court on this 31st day of May, 1906.

(Sgd.) H. D. McGEORGE,
Deputy Clerk, Supreme Court, P. I., In Charge.

133 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

It is hereby certified that on this 31st day of May, 1906, there have been forwarded to the Court of First Instance of Manila the certified copies of the decision and sentence rendered in the matter prose-

cuted by Concepcion Calvo versus Angeles O. de Gutierrez, *et al., in re* a sum of money.

To which I certify,

(Sgd.) H. D. McGEORGE,
Deputy Clerk, Supreme Court, Philippine Islands, In Charge.

134 Received from the Deputy Clerk of the Supreme Court of the Philippines the certified copies of the decision and sentence rendered by that Court in the matter prosecuted in this Court by Concepcion Calvo against Angeles O. de Gutierrez, *et al., in re* a sum of money.

Manila, P. I., May 31st, 1906.

(Sgd.) J. McMICKING,
Clerk of the Court.

135 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 2333.

CONCEPCION CALVO, Plaintiff and Appellee,
against
ANGELES OLIVES and Her Husband EDUARDO GUTIERREZ, and PAZ OLIVES DE MARTINEZ and Her Husband MANUEL MARTINEZ, and GABRIEL OLIVES, Defendants and Appellants.

It is hereby stipulated by and between the parties to the above entitled cause that the foregoing are true and correct copies and translations of the papers and proceedings contained in the record in said cause in the Supreme Court of the Philippine Islands.

COUDERT BROTHERS,
Attorneys for Appellant.

June 12, 1906.

HARTIGAN, ROHDE & GUTIERREZ,
Attorneys for Appellees.

136 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 2342.

CONCEPCION CALVO, Plaintiff,
vs.
ANGELES O. DE GUTIERREZ and Her Husband, EDUARDO GUTIERREZ; GABRIEL OLIVARES, PAZ O. DE MARTINEZ and Her Husband, MANUEL MARTINEZ, Defendants.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing is a true and complete transcript of the records and proceedings had in the above entitled

cause, and pursuant to an order of the Honorable Charles A. Willard, Associate Justice of this Court entered the tenth of May, 1906, allowing an appeal to the Supreme Court of the United States, the same is transmitted herewith.

Manila, June 22, 1906.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk, Supreme Court, P. I.

Endorsed on cover: File No. 20,328. Philippine Islands supreme court. Term No. 80. Concepcion Calvo, appellant, *vs.* Angeles O. de Gutierrez and Eduardo Gutierrez, her husband; Gabriel Olives, Paz O. de Martinez and Manuel Martinez, her husband. Filed August 9, 1906. File No. 20,328.

SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 80.

OCT 23 1902
JAMES H. McKENNEY,

CONCEPCION CALVO,
Plaintiff and Appellant,

vs.

ANGELES O. DE GUTIERREZ and others,
Defendants and Appellees.

BRIEF FOR APPELLANT.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Appellant.
2 Rector Street,
New York City, N. Y.

R. H. TYRRELL, PRINTER, 206-208 FULTON STREET, NEW YORK.

SUPREME COURT OF THE UNITED STATES.

CONCEPCION CALVO,
Plaintiff and Appellant,

against

ANGELES O. DE GUTIERREZ and others,
Defendants and Appellees.

No. 80.
October Term, 1907.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a final judgment or decree of the Supreme Court of the Philippine Islands, which reversed a judgment in favor of the plaintiff rendered by the Court of First Instance of the City of Manila.

The action is in effect a bill in equity to procure the specific performance of a partially executed contract, and an accounting for the proceeds of certain property, sold pursuant to such contract, and to have paid into some depositary designated by the Court, for the life-usufruct of plaintiff, the balance of such proceeds after the payment of certain claims, and for other relief. The plain-

tiff was successful in the Court of First Instance, which made a judgment providing for the disposition under the Court's direction of the sum of $65,548.17 Philippine currency (see Rec., fol. 74), and adjudging plaintiff's right to have the same held for her benefit during her life. The plaintiff was also adjudged to be entitled to a one-half interest for life in certain real property. The defendants appealed from this judgment to the Supreme Court of the Philippine Islands, which reversed the Court below (Rec., p. 67, fol. 120). From such judgment of reversal this appeal is taken.

Statement of Facts.

The material facts are substantially uncontroverted.

Francisco Gonzales de la Fuente y Esquivel died in 1902, leaving a will by which he left the usufruct of his residuary estate to his wife (the plaintiff-appellant) and the ownership in remainder to his nephew and nieces, the defendants Gabriel, Angeles and Paz Olives. At the time of his death he owned a one-half interest in No. 90 Escolta, Manila, No. 97 Palacio, Manila, and a hacienda at Pasacao. The other half interest in these properties belonged to his nephew and nieces above mentioned. He was also the record owner of two other pieces of property known as the "Ermita" houses.

Certain controversies arose between the parties interested, and were adjusted by the agreement of May 4th, 1903, upon which this case turns (Plaintiff's Exh. A; Rec., p. 45). By this agreement the plaintiff recognized a claim by the Olives

children to a one-half interest in the Ermita property and consented to a sale of the Escolta property for not less than $90,000. The agreement then provided that from the proceeds of the sale there should be paid certain specified debts and claims and that "the remainder" should be "turned over" to plaintiff "to be used by her as usufructuary heiress." The agreement also contained a waiver of any accounting to the Olives children as wards of the testator, and other provisions not now necessary to discuss.

The Escolta property was sold for $90,000. When the conveyance was made, some months after the agreement, the plaintiff went to the Notary's office, signed the papers, and withdrew before the arrival of the defendants, whom she prefered not to meet in order to avoid any occasion for friction (Rec., fol. 22). A lawyer, Señor Ortigas, attended the closing of the title, and purported to represent her (Rec., fol. 24). After the closing, certain debts and claims, amounting to $11,741.53, were paid from the proceeds (Rec., fols. 3, 8); $45,892.50 was taken by the defendants, and the balance was left with the notary (Rec., fol. 9). The Ermita property was redeemed by the former owner for $15,000, out of which a claim of $12,000 was paid, and the balance taken by the defendants (Rec., fol. 9).

The plaintiff was entitled to have turned over to her for her life usufruct, upon giving security, the whole balance of the proceeds of the Escolta property, one-half of the balance of the proceeds of the Ermita property, and a one-half interest in the Palacio and Pasacao properties. The Court of First Instance awarded this relief to her, holding

that the Agreement of May 4th, 1903, was to be construed according to its plain language, and operated to give to the plaintiff the whole remainder of the proceeds of the Escolta property after the payments provided for. The Philippine Supreme Court reversed this judgment, holding that the agreement in question was not to be construed according to its language, but according to the Court's views of the surrounding circumstances and the relations of the parties. Although there had been no sufficient motion for a new trial in the Court below to make such a course proper, the Appellate Court reviewed the evidence, and determined as a matter of fact that the parties intended that "the remainder" of the proceeds should mean one-half of such remainder, proportionate to plaintiff's one-half interest in the parcel.

Specification of Errors.

First.—The Court below erred in not construing the Agreement of May 4th, 1903, according to its plain language. (First Asst. of Error, Rec., fol. 124.)

Second.—The Court below erred in reviewing the evidence and finding therefrom the intentions of the parties to said agreement otherwise than as determined by the Trial Court. (Third Asst. of Error, fol. 125.)

Third.—The Court below construed said agreement erroneously. (Second and Fourth Assts. of Error, fols. 124-5.)

Fourth.—The Court below erred in not affirming the Trial Court, or, if it reversed on the ground

that the intention of the parties should be found as a matter of fact from the evidence, in not ordering a new trial. (First-Sixth Assts. of Error, fols. 124-5.)

Brief of the Argument.

The language of the agreement was perfectly plain and unambiguous and required no judicial construction. On its face it gave plaintiff the whole balance of the proceeds of the Escolta property. It was wholly unnecessary to go into the surrounding facts and circumstances, but even when this was done there was no sufficient basis for finding that the parties intended anything different from what they said. In fact the evidence rather points to a contrary conclusion and shows that plaintiff was deliberately kept in ignorance of the situation by the other parties and by the lawyer who was purporting to act as her attorney. The Appellate Court had no jurisdiction to review the evidence or pass on the facts, and if it concluded that the language of the agreement was ambiguous and not controlling, and that it was necessary to examine the circumstances of the transaction in order to determine the intention of the parties, it should have directed a new trial in the Court below for this purpose.

POINTS.

I.

The language of the Agreement is plain and unambiguous and requires no judicial construction.

This agreement is, on its face, an adjustment of various controversies between the parties, growing out of their relations to the de la Fuente estate. It deals with the following properties and subjects:

1. The Escolta property and its sale at a certain minimum price.

   (This property belonged one-half to the testator and one-half to the Olives children.)

2. The Ermita property, purchased from Pantaleone.

   (This apparently belonged to the testator as owner of record, but a one-half interest was claimed by the Olives children.)

3. The Palacio and Pasacao properties.

   (These belonged one-half to the testator and one-half to the Olives children.)

4. The disposition of testator's personal effects.

5. The payment of certain debts, claims and expenses pertaining in whole or in part to testator's estate.

6. The relations of guardian and ward between testator and the Olives children.

7. The disposition of the proceeds of the Escolta property.

The present controversy arises over this last item, but the language of the agreement leaves no room for any real dispute. It reads as follows:

> "*First.*—The property No. on the Escolta, half of which belonged to the testator, shall be sold at the price not less than Ninety thousand dollars.
>
> *Second.*—From the proceeds of the sale there shall be paid the amount owing to Pious Works, the amount owing Mr. Roensch, that owing Julian La O, and the unpaid legacies made by José Gonzalez de la Fuente.
>
> *Third.*—The remainder shall be turned over to Concepcion Calvo to be used by her as usufructuary heiress after she has given a mortgage bond (fianza hipotecaria)." (Rec., fol. 79.)

There is no ambiguity, latent or otherwise, in this language.

It plainly means, and can only mean:

1. The Escolta property shall be sold for not less than $90,000.
2. Certain claims shall be paid "from the proceeds."
3. "The remainder shall be turned over" to plaintiff in usufruct.

To say that "the remainder" means "one-half of the remainder" is to make a new contract for the parties, in direct contravention of Article 1281

of the Spanish and Philippine Civil Code, which reads as follows:

"Article 1281. If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed."

This is precisely the same in effect as the Roman law maxim: "*Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio,*" (Digest, Book XXXII., Tit. 1, L. 25), and also the familiar common law rule, that "if the language of the instrument is plain and unambiguous of itself, there is no room for interpretation and construction." (Am. & Eng. Encycl. of Law, 2d Ed., Vol. 17, p. 4.)

It would seem almost superfluous to comment further upon this explicit statutory provision, and we will therefore confine ourselves to two brief quotations from eminent Spanish authorities, who state the effect of the rule as follows:

Alcubilla; Diccionario de la Administracion Española, 5th Ed., Vol. 3, p. 494.

Text.	*Translation.*
"Cuando es clara y terminante la letra de un contrato, sin que su inteligencia ofrezca duda alguna, no caben interpretaciones que alteren ó cambien su sentido literal ni estricto."	"If the language of a contract is clear and definite, and its understanding presents no doubts, interpretations which alter or change its strict and literal meaning are not admissible."

Scaevola; Codigo Civil, Vol. XX., p. 834.

Text.	*Translation.*
"Cuando las cláusulas de un contrato son	"When the terms of a contract are clear and

claras y precisas, no hay necesidad de interpretarlas.

* * * *

"Cuando las condiciones estipuladas en un contrato son claras en su tenor, no hay necesidad de recurrir á interpretaciones que solo autoriza la ley cuando la oscuridad ó la duda las haga absolutamente necesarias para una justa resolucion."

precise, it is not necessary to interpret them.

* * * *

"When the provisions agreed upon in a contract are clear in their meaning, it is not necessary to resort to interpretations, which the law authorizes *only* when obscurity or doubt makes them absolutely necessary for a just determination."

Thus, according to both civil law and common law, as well as common sense, when the language of the parties to a contract clearly expresses a certain intention, it is not open to them to say that they meant something different, or to a court to make for them a new contract which it considers more equitable.

The Court below argued that

> "the word 'remainder' must be limited to the inheritance which it was the intention and object of the parties to divide, for the preamble expressly states that the parties, as heirs of Francisco Gonzales de la Fuente, agree upon a division of the inheritance, and it is admitted that one-half of the property on the Escolta was the property of the defendants, and formed no part whatever of said inheritance." (Rec., fol. 109).

This argument is wholly fallacious, since the agreement is by no means limited in scope to a division of the estate of Gonzales de la Fuente, but provides for an adjustment and recognition of the rights of all the parties entitled or claiming

to be entitled to any interest in various properties in which said testator had an interest, and for the payment of claims, some of which, such as the mortgage to the Obras Pias, were apparently not sole and individual liabilities of the testator. It might as well be contended that the recognition of the claim of the Olives children to a one-half interest in the Ermita property was of no effect, since such interest was claimed by them as their own property, and not as a distributive share of the estate. Article 1283 of the Civil Code, cited by the Court below (fol. 109) is thus wholly inapplicable. The agreement shows on its face that the parties "proposed to contract" not merely regarding the "division of the inheritance," but also regarding the Escolta property generally and the other properties and subjects above mentioned. The main *object* of the agreement was a distribution of the estate, but it included other "subjects, things and cases" in its scope.

II.

The Court below had no jurisdiction to review the evidence, and interpret the contract according to the facts thus found by it as to the parties' intentions.

The power of the Supreme Court of the Philippine Islands to "review the evidence taken in the Court below" and to make findings upon the facts and render final judgment, is limited to cases in

which there has been a motion for a new trial, on the ground that "the findings of facts were plainly and manifestly against the weight of evidence."

(See Philippine Code of Civ. Proc. Sec. 497).

The motion for a new trial in the case at bar was merely on the ground that the evidence was not sufficient to justify the judgment (Rec., fol. 75), and was thus evidently made under section 145 of the Philippine Code of Civil Procedure, and addressed to the discretion of the trial judge (sec. 146, id.).

This clearly did not empower the Appellate Court to review the evidence and in effect make new findings of fact as to the intention of the parties, based on parole evidence. This Court has held that the motion for a new trial should conform to the Statute in order to justify such a review, and that there should not be a reversal unless the findings of the Trial Court were " plainly and manifestly against the weight of evidence." (See De la Rama *v.* De la Rama, 201 U. S., 303, at 313-4.)

The Trial Court held, as a matter of law, that the agreement meant a certain thing. The Appellate Court had a right to review this determination, and if it held as a *matter of law* that the agreement meant something else, to so adjudge. But it did not do this; it held that it was ambiguous (Rec., fol. 109) and subject to be construed according to the intention of the parties as deduced from the surrounding circumstances.

This was a question of fact which the Appellate Court was without power to determine. If it held the agreement to be ambiguous, it should

have sent the cause back for a new trial, upon which both sides would have had an opportunity to put in all their evidence tending to show the intention of the parties under Art. 1282 of the Philippine Civil Code. Obviously the plaintiff upon the trial relied on the plain meaning of the language of the agreement and was sustained in this by the Trial Court. If the language does not control, and the circumstances must be examined, she should have her day in Court on this issue, which she has never had.

III.

Upon the record before it, the Court below construed the Agreement erroneously.

Even when the surrounding facts and the relations of the parties, as disclosed by the record, are considered, it is clear that the finding of the Appellate Court as to the intention of the parties is erroneous. It clearly appears that the parties had various subjects of controversy, and the observations of the Court below as to the relative adequacy, as a consideration, of their respective concessions, are purely speculative. Plaintiff's payments for funeral expenses &c., mentioned in the Fourth Article of the agreement, may have greatly exceeded in value the "movable property" of the testator. The waivers of accounting of the testator's guardianship may have been a benefit to either side, for there is nothing to show in

whose favor the balance would have been. Plaintiff's recognition of defendants' claim to a half interest in the Ermita property was certainly of value to them, for there may have been no evidence whatever by which they could have established such claim. It would appear that plaintiff was unwilling to sell the Escolta property, and her consent to its sale was a decided concession on her part. There was no evidence as to its value, and the conclusion of the Court below that "the sale was an extremely advantageous one" (Rec., fol. 112) is a mere *ipse dixit*. There is no claim that the contract was without consideration, or that there was such inadequacy as to import fraud, hence speculation as to the relative value of the concessions and agreements of the parties is immaterial and improper. The case is a good illustration of the wisdom of the rule of the common law against the admissibility of parole evidence to vary the terms of a valid written instrument. Some of the debts and claims which were paid out of the proceeds of the sale were apparently liabilities of the testator's estate only (e. g. the La O. claim—see Rec., fol. 9), and there is nothing in the circumstances of the transaction to indicate that the "proceeds" out of which such payment was to be made meant one thing (the *whole* proceeds) and the "remainder" meant something else (*one-half* of the proceeds). There were mutual concessions made which resulted in the contract. The Philippine Supreme Court has made another and different one.

The most significant fact in the record is the payment by Ortigas individually of one-half of the amount given to the tenant in compromise of his claim for damages, and the concealment of such

arrangement from the plaintiff (Rec., pp. 33-34). There was no satisfactory explanation of or reason for this course, and it effectually answers any arguments based on alleged acquiescence by Ortigas, as plaintiff's representative, if it does not cast a certain suspicion on the frankness of his whole testimony. Why should Ortigas have secretly paid a liability of plaintiff unless he had something else to conceal in the way of breach of instructions, collusion with the other side, or forgetfulness of the terms of the agreement?

The words of the agreement do not "appear *contrary* to the evident intention of parties" (Civil Code, art. 1281, 2d clause), for the best evidence of their intention is the plain language in which it is expressed. If evidence to the contrary be sought in "their acts, contemporaneous and subsequent to the contract" (Civil Code, art. 1282), none will be found. Plaintiff refused to sign any document or do any act which could be construed into an admission that she intended the construction put upon the contract by the Court below (Rec., fol. 18). The acts of the other parties cannot be used as evidence in their favor, and the acts of Señor Ortigas are not binding upon the plaintiff, since there is no evidence whatever that he was authorized to do anything more than serve as an intermediary between the plaintiff and the defendants (Rec., fols. 17, 19).

Even if the parties had, by their acts, put a different construction upon the agreement, this could not prevail over its plain language:—"when its meaning is clear in the eye of the law, the error of the parties cannot control its effect" (Railroad Co. *v.* Trimble, 10 Wall., 367 at 377).

This is wholly different from such a case as

Serralles' Succession *v.* Esbri, 200 U. S., 103, where this Court held that the intention of the parties should prevail over the strict and literal construction of the contract in order to prevent a manifest injustice. There it was indisputable that the parties to a contract made in 1894 could not have contemplated the subsequent transfer of Porto Rico to the United States, and the substitution of a new system of currency. It was plain that a literal construction of the contract, *as applied under such new conditions,* did not "convey the true meaning of the parties," and would work great hardship. In the case at bar, there was no change of conditions, altering the *onus* of the contract, and nothing but conjecture to support the argument that its literal meaning was in any way inequitable.

Such inferences as may properly be drawn from the evidence support a construction of the agreement according to its language, rather than according to the speculations of the Appellate Court, and, in any event, it is obvious that the findings of the Trial Court as to the intention of the parties were not "plainly and manifestly against the weight of evidence."

Conclusion.

The judgment of the Philippine Supreme Court should be reversed and that of the Trial Court affirmed.

Respectfully submitted,

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Appellant,
2 Rector Street,
New York.